Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-104

JAMES JOHNSON, ET AL.,
Appellants,

v.

ATTORNEY GENERAL OF MARYLAND, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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Appellants, James and Sheila Johnson, appeal from the judgment of the Court of Appeals of Maryland entered on April 5, 1978. The decision of the Maryland Court reversed a judgment of the Baltimore City Court.

James and Sheila Johnson submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, filed on April 5, 1978, and captioned below as *Attorney General of the State of Maryland, et al. v. James Johnson, et al.*, is reported at 358 A.2d 57 (1978). The order of the Court of Appeals denying the Motion for Reconsideration and Stay of Judgment was entered on April 21, 1978. The opinions of the Court of Appeals and the Baltimore City Court are printed herein as Appendices A and B.

JURISDICTION

James and Sheila Johnson filed an Amended Petition for Declaratory Judgment in the Baltimore City Court on December 22, 1976, seeking a declaration that a Maryland statute, the Health Care Malpractice Claims Act, 1976, violated the Constitutions of the United States and of Maryland. The Baltimore City Court entered a judgment declaring the Act void as a violation of the Maryland Constitution.

The Court of Appeals of Maryland reversed the judgment of the Baltimore City Court, holding that the Act did not violate the Maryland Constitution, and agreeing that the Act did not violate the United States Constitution. On April 21, 1978, the Court of Appeals denied a timely Motion for Reconsideration and for Stay of Mandate filed by the Johnsons. The Baltimore City Court entered a judgment declaring the Act unconstitutional and valid on July 10, 1978. Notice of Appeal to this Court was filed in the Court of Appeals on April 27, 1978.

Jurisdiction of this appeal is conferred upon the Supreme Court by 28 U.S.C. §1257(2) (1970), in that the Court of Appeals of Maryland has declined to hold unconstitutional a statute of that state. The following decisions of this Court sustain its jurisdiction to review the judgment on direct appeal in this case: *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); *Western Turf Ass'n. v. Greenberg,* 204 U.S. 359 (1907).

The statute at issue is the Health Care Malpractice Claims Act which is printed in the 1977 Supplement of the Courts and Judicial Proceedings Article of the Maryland Annotated Code, §3-2A01 *et seq.* and appears in Appendix E herein.

QUESTIONS PRESENTED

1. Does the arbitrariness inherent in the arbitration procedure as created by the Act, as well as the high costs of proceeding to court after arbitration, effectively deny the victims of medical malpractice a meaningful opportunity to vindicate their property right to tort damages in violation of the Fourteenth Amendment's Due Process Clause?

2. Does the fact that the arbitration procedure created by the Act bears no substantial relation to the legislative goal of improving health care in Maryland, given that it ultimately results in a more costly settlement process and a lower standard of health care quality, invalidate the Act under the Fourteenth Amendment's Equal Protection Clause?

STATEMENT OF THE CASE

In 1976, the General Assembly of Maryland passed the Health Care Malpractice Claims Act which requires that any suit against a "health care provider" for a medical injury in which damages of more than $5000 are sought be governed by the procedures created by the

Act. Essentially, medical malpractice claimants are singled out from among tort victims to establish their claims before an arbitration panel who will make the initial determination of liability and damages. Upon rejection of the panel's award, the claimant can finally proceed to court, at which he will get a trial *de novo* in which the panel's award will be introduced as evidence and presumed correct.

The Appellants James and Sheila Johnson, prevented by the Act from filing their suit for the wrongful death of their infant daughter in court until arbitration was complete, filed a Petition for Declaratory Judgment in the Baltimore City Court. In the Petition, the Appellants alleged that the Act violated the Maryland Constitution because it unlawfully delegated judicial power and denied the claimant's right to jury trial, and that it violated the Equal Protection and Due Process Clauses of both the United States and Maryland Constitutions.

The trial court entered a judgment declaring the Act void on State constitutional grounds, as an impermissible delegation of judicial power and denial of the right to a trial by jury. The State appealed from the trial court's judgment and the Johnsons cross-appealed the trial court's finding that the Act did not violate the Federal Constitution's guarantees of due process and equal protection to the Court of Special Appeals of Maryland.

Maryland's Court of Appeals issued a writ of certiorari prior to a decision by the intermediate appellate court. On April 5, 1978 the Court of Appeals reversed the trial court's judgment, holding that the Act was neither an impermissible delegation of judicial power nor a violation of the right to trial by jury. The Court of Appeals further held that the Act neither denied medical malpractice victims equal protection of

the laws nor due process as guaranteed by the Federal and Maryland Constitutions.

The Appellant's Motion for Reconsideration and Stay of Mandate was denied by the Court of Appeals on April 21, 1978. After entry of the judgment in the Baltimore City Court declaring the Act constitutional, the Johnsons timely filed this appeal.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I.

MARYLAND'S HEALTH CARE MALPRACTICE CLAIMS ACT DENIES THE VICTIMS OF MEDICAL MALPRACTICE DUE PROCESS OF LAW IN THAT IT SIGNIFICANTLY ALTERS THE VICTIMS' PROPERTY RIGHT TO TORT DAMAGES WITHOUT PROVIDING A MEANINGFUL OPPORTUNITY TO BE HEARD.

Before the procedural protections of the Due Process Clause can be invoked, a malpractice victim's right to damages for his bodily injuries must be established as a constitutionally protected "property right." In *Board of Regents v. Roth,* 408 U.S. 564 (1972), this Court stated that property interests are:

> created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 577.

The nature of property rights was further delineated in *Paul v. Davis,* 424 U.S. 693 (1976) when this Court said that property interests:

> attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law . . . 424 U.S. at 710.

A medical malpractice victim's right to damages for his injuries is recognized and protected by Maryland law and so has attained constitutional status. It is,

therefore, due the procedural protections found in the Fourteenth Amendment's Due Process Clause.

The concept of an entitlement to damages for tortious injuries has its origins in the common law. This Maryland right was recognized by a federal court in *Sanner v. Trustees of the Sheppard and Enoch Pratt Hospital,* 278 F. Supp. 138 (D. Md. 1968), as follows:

> The right to recover damages against another who negligently inflicts injury has always been recognized as a property right. 278 F. Supp. at 142.

However, the right to recover tort damages is no longer a right protected by Maryland's common law alone; the right has "attained constitutional status" due to the fact that it has been recognized by Maryland's Wrongful Death Statute (Md. Cts. and Jud. Pro. Code Ann. §3-901 *et seq.* 1974) and by the Health Care Malpractice Claims Act itself. The right to recover for wrongful death due to the negligence of a "health care provider" is recognized and protected by Maryland statute. Hence, it is precisely the type of property interest which the *Roth* and *Paul* Courts described as being within the ambit of the Due Process Clause.

Once the property right is established, it is subject to the protection of the Fourteenth Amendment:

> [W]e have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. *Paul,* 424 U.S. at 710-711.

The procedures provided by the Health Care Malpractice Claims Act (hereinafter the Act) for the vindication of a medical malpractice victim's right to damages are arbitrary and capricious, and effectively deny him a meaningful opportunity to be heard. The Act thus violates the Due Process Clause of the Fourteenth Amendment. *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972).

The first way in which a medical malpractice claimant is denied a meaningful opportunity to be heard is that, at the arbitration level, his rights are adjudicated by a biased decisionmaker. According to § 3-2A03 of the Act the three arbitrators are to be selected from three categories of individuals — attorneys, health care providers, and laymen. Every health care provider who serves on the panel will have a pecuniary interest in the outcome of the arbitration in that a large damage award will adversely affect the malpractice insurance premiums of that arbitrator. In the case at bar, the trial court judge pointed out in his opinion that the danger of bias is "particularly existent in Maryland, where over 90% of its practicing physicians are covered by one insurer." (A. 66a).

Not only does the Act build bias into its procedure by including a health care provider on the panel, it also furthers the opportunity for arbitrariness by failing to provide any effective *voir dire.* The Act only provides in § 3-2A04(c) that each party may strike any two names from the list of possible panel members provided by the Director. The parties have no opportunity to examine the panel candidates as to their interests in the determination of liability and damages.

The presence of a biased decisionmaker on the panel denies the claimant a meaningful opportunity to be heard. In *Withrow v. Larkin,* 421 U.S. 35 (1975) the Court said:

> Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' [Citations omitted] In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudica-

> tor has a pecuniary interest in the outcome. . . . 421 U.S. at 47.

In *Gibson v. Berryhill,* 411 U.S. 564 (1973), this Court found that the private practitioners comprising an Alabama Board of Optometry had a pecuniary interest in the outcome of their decision which disqualified them from passing on particular issues. If the Board of Optometry had been successful in barring corporate optometrists from practice in Alabama, the Board members would have fallen heir to the business of the corporate optometrists. The *Gibson* Court agreed with the lower court that:

> To require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law . . . . 411 U.S. at 571.

Similarly, to force a malpractice plaintiff to submit his claim to a panel where the member most expert in deciding the issue of negligence also has a substantial pecuniary interest in the procedure's outcome, is to deny the claimant due process of law.

The second way in which the Maryland procedure is arbitrary is that the Act fails to direct what rules the panel is to use in determining whether the health care provider has acted negligently, what rules of evidence are applicable, or how to assess damages. In an early decision on the delegation of powers to an administrative agency, *Morgan v. U.S.,* 304 U.S. 1 (1937), this Court said:

> The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the

> rudimentary requirements of fair play. These demand a 'fair and open hearing . . . .' 304 U.S. at 14-15.

Inherent in the notion of "fair play" is the requirement that tort claimants who are similarly situated should be subject to the same rules of law, so as to avoid inequitable and inconsistent results. The Maryland Act in question fails to meet this requirement and so violates due process. By way of illustration, if the "informed consent" doctrine is applied by one panel but ignored by the next panel, or if hearsay evidence is admitted in one arbitration hearing but not another, the determinations of liability made by the panel and the awards given will be completely arbitrary. Arbitrary decisions from panel to panel effectively deny medical malpractice victims a meaningful opportunity to be heard, as guaranteed by the Fourteenth Amendment's Due Process Clause. *Fuentes,* 407 U.S. at 80.

The procedure provided by the Act is arbitrary in a third way: it is unreasonable to presume at the trial level that the panel's finding is correct. In *Hawkins v. Bleakly,* 243 U.S. 210 (1917), a case in which the Court addressed the constitutionality of presumptions in the context of Workman's Compensation statutes, the Court held:

> that the establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, *not unreasonable in itself,* and not conclusive of the rights of the party, does not constitute a denial of due process of law. 243 U.S. at 214. (emphasis added).

Section 3-2A06(d) of the Act says that the panel's award is "admissible and presumed to be correct" at the court trial instituted by the party rejecting the panel's award. The panel's determination of liability and damages cannot reasonably be presumed correct when the grounds for decision are not required to be specified by

the Act; there is no right or wrong when there are no standards for decision.

Even if it can be assumed that the panel is to apply existing tort principles, it is unreasonable to assume that the panel members have correctly applied those principles. A majority of the panel has had no legal training or exposure to the intricacies of tort law. Nor will the panel members develop any legal expertise, because the composition of the panels is constantly changing. The medical malpractice arbitration procedure should be contrasted with the Workman's Compensation process in Maryland where, at the trial *de novo,* only the Commission's findings of fact are presumed correct, not their interpretations of the applicable law. Due to the absence of decisional standards and the inability of the majority of panel members to competently apply tort law, it is unreasonable to presume that the panel's findings on the issues of liability and damages will be correct; an unreasonable presumption constitutes a violation of due process. *Hawkins,* 243 U.S. at 214.

The aforementioned statutory infirmities might be more constitutionally acceptable if a claimant were also provided with access to the courts as a necessary safeguard of his property right. See e.g., *American Power & Light Co. v. S.E.C.,* 329 U.S. 90, 105 (1946). The Act provides in § 3-2A06 that a party may reject an award for any reason and, upon rejection, has a right to a trial *de novo* at which the panel's decision will be introduced into evidence and presumed correct. If the court's verdict is not more favorable to the party who rejected the panel's award, § 3-2A06(e) specifies that the costs of the judicial proceedings shall be assessed against the rejecting party. The prohibitive costs of trying a malpractice claim twice, the introduction of the panel's finding at trial, and the risk of being assessed the costs of the judicial proceedings constitute insur-

mountable barriers which effectively deny a medical malpractice victim access to the courts. If the claimant's case was arbitrarily disposed of by the arbitration panel, the combination of costs and unreasonable presumption will prevent judicial vindication of his property right. The total effect is a denial of any meaningful opportunity to be heard in violation of the Due Process Clause.

Judge Greenfeld, at the trial court level, listed the costs incurred by a claimant when forced to submit to a double-tiered adjudicative process. Before the panel, the costs are: (1) the cost of expert testimony at arbitration (at least $2,000.00), (2) the arbitrators' fees, if assessed against him, of $140.00 per day, and (3) the cost of a transcript at $300.00 per day. No claimant will forego a transcript of the arbitration proceeding given the potential for bias and misinterpretation of the law on the part of the arbitrators. These are essential grounds for vacating the award according to § 3-2A06(c). In addition to these costs, a claimant will incur $3,000.00 to $7,500.00 in preparing and presenting his case in court, which includes the costs of experts, depositions, etc., but does not include attorneys' fees. Victims with smaller claims will find court costs economically prohibitive because any damages ultimately awarded will be obliterated by expenses. Plus the claimant runs the risk of being assessed his opponent's court costs if the court verdict is not more favorable than was the panel's. The procedural obstacles built into the Maryland arbitration system prevent the malpractice plaintiff from obtaining a fair hearing and deny him the safeguards due his property right under the Fourteenth Amendment.

The arbitration procedure, because of its bias, absence of standards, and unreasonable presumption, is arbitrary and, in itself, a violation of due process. The

remedy provided by the Act upon dissatisfaction with the arbitration procedure, (a trial *de novo*), together with arbitration, will often cost more than the amount of damages which can possibly be awarded. Because of these infirmities, many of the victims of medical malpractice will be denied the meaningful opportunity to be heard required by the Due Process Clause.

II.

MARYLAND'S HEALTH CARE MALPRACTICE CLAIMS ACT DENIES MEDICAL MALPRACTICE VICTIMS EQUAL PROTECTION OF THE LAWS IN THAT THE ARBITRATION PROCEDURE HAS NO FAIR AND SUBSTANTIAL RELATION TO A LEGITIMATE LEGISLATIVE OBJECTIVE.

The particular ways in which the act is supposed to alleviate the medical malpractice crisis are variously described in the lower court opinions. Judge Greenfeld, at the trial court level, found that of the benefits of arbitration enumerated in the legislative history, only the "advantage of inducing a claimant to drop the claim if the arbitration award is adverse" was accurate. (A. 54a).

Maryland's Court of Appeals found the purpose of the Act to be "to reduce the cost of medical malpractice claims, thus reducing the cost of liability insurance and stabilizing the market." (A. 37a). Arbitration will allegedly reduce the costs of malpractice claims by saving the expense of judicial proceedings, limiting awards, and deterring those with adverse panel findings from continuing the suit. Reducing the costs of health care was held to be a valid legislative objective, within the bounds of the police power.

In its recent statements on the Equal Protection Clause the standard which this Court has used to determine the validity of a classification is:

> A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

Reed v. Reed, 404 U.S. 71, 76 (1971), *Eisenstadt v. Baird,* 405 U.S. 438, 447 (1972). The class at issue here is medical malpractice victims, singled out from among other tort victims by the Act's special procedures. The double-tiered procedure for the vindication of their property right to wrongful death damages has no fair and substantial relation to any legitimate legislative objective.

First, it is difficult to discern how the arbitration procedure will be less expensive and faster than the previously existing adjudication system. At arbitration, the claimant will still incur the costs of depositions, the cost of producing experts before the panel, transcript costs, arbitrations' costs and attorney's fees — essentially all of the costs typically incurred in going to court. These costs will be doubled if the claimant rejects the panel's award and goes to court; and there are strong inducements for rejecting the panel's award. The probability of a biased panel member, would induce a claimant to seek a more neutral forum in the courts.

A claimant may also be induced to go to court because the panel's decision is not an adequate reflection of what will occur at court:

> The success on any nonbinding review procedure in encouraging settlement of claims depends at least in part upon its capacity to predict what will occur at trial. When review procedures accurately reflect the nature of trial presentation, the parties must afford great weight to the recommendation of the board because its prediction is likely to be accurate.

Kenneth S. Abraham, "Medical Malpractice Reform: A Preliminary Analysis," 36 Md. L. Rev. 489, 513 (1977). A claimant cannot count on the panel's findings as

predictive of a court's conclusion, not only because of the presence of a biased panel member, but also because the Act does not anywhere specify what laws are applicable at arbitration, nor what rules of evidence apply, nor what considerations should determine the amount of the award. The arbitrariness of the malpractice procedure will induce the claimant to proceed to court, resulting in higher costs and more time spent settling grievances — the antithesis of the legislative purpose. The means chosen by the legislature, i.e., arbitration, has no fair and substantial relation to the objective of cutting costs and saving time. Therefore, the classification prescribing different investment for medical malpractice victims is a denial of equal protection.

However, as was discussed earlier, the high costs of going to trial after arbitration and the introduction of the panel's finding at trial will deter most from rejecting the panel's decision. These procedural obstacles are built into the system so as to deter suits and force claimants to accept the panel's finding of no negligence or its limited damages award. The legislature has designed a system which, whether by its arbitrariness or high costs, deters medical malpractice victims from filing suit at all or forces them to be satisfied with the panel's finding. Fewer suits and limited damages awards will cause malpractice premiums to drop and will stabilize the insurance market.

The issue becomes whether deterring malpractice and limiting awards is an effective way to improve health care in Maryland. The Act is largely the product of the legislature's belief that the rapidly rising number of medical malpractice suits being filed and the amount of damages being awarded by juries has caused a crisis in the medical profession.

In "Doctors, Damages, and Deterrence: An Economic View of Medical Malpractice," N. Eng. J. Med. 298:

1282-1289 (June 8, 1978), the authors Dr. William Schwartz and Dr. Neil Komesar apply a Learned Hand negligence calculus to the tort of medical malpractice. According to the authors, although since 1972 the number of malpractice claims has risen by nearly 50 per cent, "at most only one out of every six or seven incidents [of malpractice] can be expected to result in a claim." N. Eng. J. Med. at 1286. On the subject of jury verdicts, the authors write that:

> It is a widespread belief that damages being awarded by American courts are excessive. . . . Criticism of high damages appears to be based, in part, on the attitude that pain and suffering are not legitimate losses for which compensation is warranted. But someone whose injury affects his life-style — say, the ability to participate in recreation or the ability to have children — is paying a price that is properly included in a damages award.
>
> The highest, and therefore the most conspicuous, awards — those in excess of $50,000 — have the largest element of compensation for pain and suffering. Such awards occur almost exclusively when a catastrophic injury, such as paralysis or severe brain damage, has resulted from negligence. In such circumstances, the effect on life-style is enormous, and a jury properly assesses the loss as a real injury that can only be compensated monetarily. In these terms, even the largest awards do not seem excessive.
>
> The average payment in the award range of less than $50,000 was substantially below medical expenses and lost earnings — typically in the range of one third to two thirds of such losses. Indeed, in the aggregate, awards in 1974 were slightly below medical expenses and lost earnings. N. Eng. J. Med. at 1285-86.

The theme of the article is that, "the negligence system makes a great deal more sense if it is understood primarily as a means to deter careless behavior rather than to compensate its victims." N. Eng. J. Med. at

1283. According to the Learned Hand calculus, negligence occurs when the cost of preventing an injury is less than the damages resulting from the injury, multiplied by the probability of the injury. Negligence law signals to doctors the amount they should invest in avoiding injuries in terms of more education, fewer patients, more careful procedures, etc. Doctors receive a true signal only if "every noteworthy incident of malpractice leads to a claim, and every valid claim to a full award." N. Eng. J. Med. at 1284.

Maryland's arbitration procedure is aimed at deterring medical malpractice suits and limiting damages awards, thereby improving health care in the state. But fewer suits and smaller awards will lead to increasing incidents of malpractice; the ultimate result will be a *lower* standard of health care because doctors will be investing far less than the optimum in negligence avoidance. Because the arbitration procedure imposed by the Act has no fair and substantial relation to the goal of improving Maryland's health care, the classification is irrational and therefore a denial of the right of medical malpractice victims to equal protection of the laws.

CONCLUSION

For the foregoing reasons, the questions presented in this appeal should be given plenary consideration and resolved by this Court with benefits of briefs on the matter and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Jurisdictional Statement was mailed this _____ of July, 1978, to Stephen J. Sfekas, Esquire, Assistant Attorney General, 201 West Preston Street, 5th Floor, Baltimore, Maryland 21201; James Thompson, Esquire, Arthur Feld, Esquire and Robert Michael, Esquire, 200 Monroe Street, Rockville, Maryland 20850, Attorneys for Montgomery County Bar Association; John F. King, Esquire, and Angus Everton, Esquire, 800 Fidelity Building, Baltimore, Maryland 21201, Attorneys for Appellees, Medical Mutual Liability Insurance Society, Medical and Chirurgical Faculty of Maryland, Johns Hopkins Hospital in accordance with 28 U.S.C. 33 (3)(b).

MARVIN ELLIN,
Attorney for Appellants.

APPENDIX A

In The Court of Appeals of Maryland

No. 108

September Term, 1977

Attorney General of Maryland et al.

v.

James Johnson et al.

Murphy, C.J., Smith, Digges, Levine, Eldridge, Orth and Cole, JJ.

Opinion by Digges, J.

Filed: April 5, 1978

In 1976 the Maryland General Assembly passed legislation, as have many other state legislatures, substantially altering the manner in which claims of medical malpractice by patients against physicians, hospitals, and other "health care providers" may be judicially resolved.[1] In general terms, the effect of this

[1] For a delineation of the various types of medical malpractice reform legislation, both passed and proposed, as well as for citation to the various state statutes enacted, see Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 Md. L. Rev. 489 (1977). For a compilation of

State's Health Care Malpractice Claims statute, Md. Code (1974, 1977 Cum. Supp.), §§ 3-2A01 to 3-2A09 of the Courts Article (the Act), is to require the submission of certain of such claims to an arbitration panel for initial ascertainment of liability and damages before resort may be had to a court of law for final determination. The plaintiffs in this declaratory judgment action asserted that the Act is constitutionally infirm as impermissibly vesting judicial power in a nonjudicial body in violation of separation of powers principles, as abridging the rights of access to the courts and of trial by jury, and as denying to malpractice claimants the equal protection of the laws. Our careful assessment of these assertions reveals that the statute is in each respect constitutionally sound.

The suit arose when James and Sheila Johnson, claiming that their minor daughter had died as a result of the negligence of unnamed physicians employed by The Johns Hopkins Hospital, and distressed by the fact that they were prevented by the 1976 enactment from immediately instituting a malpractice action in a court of law, sought a declaratory judgment to the effect that the Act violated federal and state constitutional provisions and that they should therefore be permitted to file their law suit without first complying with the new statute. Originally named as defendants were Francis B. Burch, Attorney General of the State of Maryland, and Ronald Schreiber, Deputy Legislative Officer for the Governor and Acting Director of the Health Claims Arbitration Office created by the statute. The Johnsons amended their petition to include The Johns Hopkins Hospital as a party defendant, and the trial court permitted intervention as parties defendant by the Medical Mutual Liability Insurance Society of Maryland, a physician-controlled insurance company created by statute, and the Medical and Chirurgical

cases involving the validity and construction of such legislation, see Annot., 80 A.L.R.3d 583 (1977). *See also* U.S. Dep't of Health, Educ. & Welfare, Pub. No. (OS) 73-88, *Medical Malpractice: Report of the Secretary's Comm'n on Medical Malpractice* (1973).

Faculty of the State of Maryland, a voluntary professional organization of Maryland physicians; the Bar Association of Montgomery County was also permitted to intervene as a party plaintiff.[2]

With the forces thus arrayed for battle, trial was had in the Baltimore City Court during the period April 25 to May 6, 1977; on June 6 judgment was entered declaring the Act invalid, the court holding that the statute unconstitutionally vested judicial power in an administrative agency and that it imposed procedural and monetary impediments substantial enough to deny claimants reasonable access to the courts and the attendant right to trial by jury. The defendants noted a timely appeal, and the plaintiffs cross-appealed from the trial court's holding that the Act did not violate the equal protection clause of the United States Constitution or the corollary due process requirements of the Maryland Declaration of Rights. We granted certiorari prior to consideration of the matter by the Court of Special Appeals and now reverse the judgment entered in the Baltimore City Court.

We have already noted the general thrust of the Act — that medical malpractice claims be submitted to arbitration as a precondition to court action — and we now outline in greater detail the mode envisioned by the statute for the accomplishment of the arbitration process and any subsequent court litigation. All malpractice claims against health care providers[3]

[2] Upon what theory the Medical Mutual Liability Insurance Society, the Medical and Chirurgical Faculty, and the Bar Association were permitted to intervene as parties, rather than simply being allowed to participate as amicus curiae, is not clear; however, since no one questions their status as parties we will not further consider the matter.

[3] Section 3-2A01(e) of the Act defines "health care provider" as "a hospital, a related institution as defined in Article 43, § 556 of the Code, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a dentist, a podiatrist, and a physical therapist, licensed or authorized to provide one or more health care services in Maryland."

seeking damages of more than $5,000 are subject to the provisions of the Act, § 3-2A02(a), and must be initially filed, as must the responses to them, with the Health Claims Arbitration Office, § 3-2A04(a), created by the statute "as a unit in the Executive Department." § 3-2A03(a). The office, acting through its director, *see* § 3-2A03(a), refers all issues raised to a three-member arbitration panel, § 3-2A05(a), chosen at random from lists of qualified persons prepared and maintained by the director, §§ 3-2A03(c) & 3-2A04(b); the panel for each claim is to be composed of an attorney, a health care provider, and a member of the general public.[4] §§ 3-2A03(c) & 3-2A04(d). The arbitration panel determines whether the health care provider is liable to the claimant and if so the extent of the damages, and incorporates in its award an assessment of costs, including arbitrators' fees, § 3-2A05(d) & (e); if no party rejects the award, it becomes final and binding, is filed by the director with the appropriate circuit court, and when confirmed by that court constitutes a final judgment. § 3-2A05(h).[5] Neither party, however, is in any way bound to accept the award; it may be rejected for any reason within ninety days. § 3-2A06(a). If a party desires to contest the decision of the panel, he

[4] If the claim falls within a recognized specialty, the director, if practicable, is to include persons in that specialty on the list of arbitrators from the health care provider category. § 3-2A04(b).

The director is also responsible for having a copy of the claim served on the health care provider, § 3-2A04(a); for delivering a list of fifteen potential arbitrators to the parties and selecting the first mutually agreeable persons after the parties have had an opportunity to strike two names in each category and to object for cause to any arbitrator, § 3-2A04(b), (c) & (d); for serving the panel's award on the parties, § 3-2A05(f); for filing the award in court if it is not rejected by any party, § 3-2A05(h); and for determining by regulation the fees which may be charged by the arbitrators. § 3-2A03(d).

[5] If initiated in a timely manner, section 3-2A05(g) allows a party to apply to the arbitration panel for modification or correction of the award in accordance with section 3-222 of the Courts Article, Md. Code (1974).

must file an action in the appropriate court during the ninety-day period to nullify the award, § 3-2A06(b) & (f),[6] and jury trial may be elected by either party. § 3-2A06(b). Any contention that an award should be vacated on the ground of corruption, fraud, partiality of the like, *see* Md. Code (1974), § 3-224(b)(1)-(4) of the Courts Article, is to be decided by the court prior to trial. § 3-2A06(c). Unless the award is thus vacated, it is admissible as evidence at the trial and presumed to be correct, with the burden of proving the contrary falling on the party rejecting it, § 3-2A06(d); should the award be vacated, "trial of the case shall proceed as if there had been no award." § 3-2A06(c). In addition, attorneys' fees are subjected to the approval respectively of the arbitration panel and the court. § 3-2A07.

Before beginning our analysis of the several challenges to the statute, we refer briefly to the circumstances, as developed at trial, which spurred the passage of this legislation. The appellees sought to show that the malpractice insurance "crisis" sweeping the nation, *see* note one *supra*, had avoided the State of Maryland, and that the General Assembly had imposed a draconian solution to a minor problem; as they put it, surgery has been performed when the patient could have been cured with aspirin. It is clear that although the dominant insurer in Maryland received a dramatic rate increase in 1974, it nonetheless decided to cease writing medical malpractice insurance in this State when it was refused its request for an additional substantial increase later that year.[7] The General Assembly at its 1975 session responded to this withdrawal notice by creating,

[6] "[T]he procedures applicable to the [court] action including the form and necessary allegations in the initial pleading shall be governed by the Maryland Rules." § 3-2A06(b).

[7] For a case relating the circumstances surrounding the refusal of the dominant insurer to continue to write medical malpractice insurance, and noting particularly the rise in the cost of such insurance, see St. Paul Fire & Mar. v. Ins. Comm'r, 275 Md. 130, 133, 339 A.2d 291, 293 (1975).

effective in June of that year, the Medical Mutual Liability Insurance Society of Maryland, *see* Md. Code (1957, 1972 Repl. Vol., 1977 Cum. Supp.), Art. 48A, §§ 548-556, an insurance company initially funded by a tax on Maryland physicians, and which now insures ninety percent of the State's doctors; availability of coverage was thereby assured.[8] In July of that year, the presiding officers of both houses of the General Assembly jointly appointed a Medical Malpractice Insurance Study Committee, which in its subsequent report to the legislature indicated that the creation of Medical Mutual represented only temporary relief for the "myriad problems of medical malpractice insurance," and recommended legislation similar to the present Act.

At trial the appellees attempted to show that the appellant Medical and Chirurgical Faculty, upon the withdrawal of the dominant insurer, frustrated new carriers from entering the market and thus itself precipitated the crisis; the trial court, however, rejected this suggestion as not being factually supported by the evidence. A great deal of testimony was also adduced during the course of the trial respecting the cost of prosecuting malpractice claims and the effect on those costs of the newly-created arbitration proceedings, the trial court concluding that a claimant's costs would be substantially increased if the case were brought to court after arbitration, and reduced if the arbitration award were accepted.

With this background, and bearing in mind that before a statute may be declared unconstitutional "its repugnancy to the provisions or necessary implications of the Constitution should be manifest and free from all reasonable doubt," *Baltimore v. State,* 15 Md. 376, 475 (1860) (concurring opinion); *see Lucky Stores v. Bd. of Appeals,* 270 Md. 513, 526, 312 A.2d 758, 765 (1973), we pause before addressing the particular constitutional

[8] No one here disputes that malpractice insurance is now very desirable, if not essential, for the protection of both the members of the medical profession and their patients.

issues to point out two basic tenets which are helpful to recall in an analysis of a statute of the character here presented. The first was well stated by Judge O'Donnell for this Court in *Salisbury Beauty Schools v. St. Bd.,* 268 Md. 32, 48-49, 300 A.2d 367, 378 (1973):

> The wisdom or expediency of a law adopted in the exercise of the police power of the state is not subject to judicial review and such a statute will not be held void if there are any considerations relating to the public welfare by which it can be supported. Such a statute is presumed to be valid and one attacking its validity has the burden of affirmatively and clearly establishing its invalidity; every intendment is in favor of the validity of the statute where there is a substantial relationship between its object and the means employed to attain that object. [Citations omitted.]

See also *Westchester West No. 2 v. Mont. Co.,* 276 Md. 448, 455, 348 A.2d 856, 860 (1975). We can thus pass no judgment on disputed questions of social policy.

The second principle to be borne in mind is that, except as circumscribed by the documents themselves, neither the Federal Constitution nor that of our State forbids the creation of new rights or the abolition of old ones recognized by the common law. "The common law, like our Acts of Assembly, [is] subject to the control and modification of the Legislature, and may be abrogated or changed as the General Assembly may think most conducive to the general welfare. . . ." *The State v. Buchanan et al.,* 5 H. & J. 317, 366 (1821) (Chase, C.J., concurring); *see State ex rel. Sonner v. Shearin,* 272 Md. 502, 510, 325 A.2d 573, 578 (1974); *Heath v. State,* 198 Md. 455, 464, 85 A.2d 43, 47 (1951).

> A person has no property, no vested interest, in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.

[*Munn v. Illinois*, 94 U.S. (4 Otto) 113, 134, 24 L. Ed. 77 (1877).]

See Silver v. Silver, 280 U.S. 117, 122, 50 S. Ct. 57, 74 L. Ed. 221 (1929). Clearly, then, there can be no question but that the legislature has the power to impose, within constitutional limits, rational conditions upon the right to turn to the courts for redress of grievances. Neither the fourteenth amendment nor our Constitution "prevent[s the General Assembly] from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object." *Jones v. Union Guano Co.*, 264 U.S. 171, 181, 44 S. Ct. 280, 68 L. Ed. 623 (1924) (upholding state statute providing that no suit for damages to crops resulting from use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients).[9] Of course the conditions imposed upon the bringing of a suit may not independently violate any rights secured by the Constitution. With this in mind, we turn to an analysis of the constitutional objections lodged by the appellees against the Act.

[9] Typical examples of such conditions placed upon common law causes of action are statutes of limitation, payment of reasonable costs deposits, and requirements that newspapers be given the right to retract before an action for libel may be filed. Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976), *cert. denied*, U.S. 97 S. Ct. 740 (1977). *See* Md. Code (1974, 1977 Cum. Supp.), § 7-201 of the Courts Article (no case at law or in equity may be docketed without payment of required fee). *See also* 1 Am. Jur. 2d *Actions* § 80, at 609 (1962). The Maryland legislature has also permitted causes of action not recognized at common law and placed preconditions upon the institution of suit under them. *See* Md. Code (1957, 1972 Repl. Vol., 1977 Cum. Supp.), Art. 57, § 18 (imposing as condition precedent to action against municipal corporation requirement that notice be given to it by claimant within 180 days after the injury or damage is sustained) (predecessor statute interpreted in Cotham and Maldonado v. Board, 260 Md. 556, 563-65, 273 A.2d 115, 119-20 (1971)); Md. Code (1974, 1977 Cum. Supp.), § 3-904 of the Courts Article (condition precedent to suit for wrongful death that action be filed within three years) (predecessor statute interpreted in State v. Parks, 148 Md. 477, 482, 129 A. 793, 795 (1925)).

I.

We address first the appellees' contention, and the trial judge's conclusion, that the Act vests judicial power in an administrative agency contrary to the mandates of the Maryland Constitution, which provides that the judicial power be vested in enumerated courts, Md. Const., Art. IV, § 1, that the powers of the three departments of government be "forever separate and distinct," Maryland Declaration of Rights, Art. 8, and that no person exercising the functions of one branch may discharge the duties of another. *Id.* We think to the contrary, that this statute, which in essence requires that malpractice disputes be submitted to nonbinding arbitration as a condition precedent to the institution of a court action, does not in any fashion impermissibly transgress the separation of powers doctrine. To conclude otherwise would be to embrace "the erroneous notion that all adjudication is judicial," *Mulhearn v. Federal Shipbuilding & Dry Dock Co.*, 2 N.J. 356, 66 A.2d 726, 730 (1949), and to overlook two crucial facts present here relevant to the exercise of judicial power: that the parties are in no way bound by the award of the arbitration panel and that the panel itself cannot enforce its award.

Preliminarily, we note that it is undeniable that the mere performance by a nonjudicial body of a function that would in another context be considered purely judicial — *e.g.*, the determination of facts and the application of legal principles to those facts — cannot alone suffice to support a conclusion that the separation of powers principle has been violated. Were that not so, of course, no administrative agency performing an adjudicatory function could survive constitutional muster. As we observed in *Dep't of Nat. Res. v. Linchester*, 274 Md. 211, 222, 334 A.2d 514, 522 (1975), while administrative agencies perform activities which are legislative in nature, they also are frequently "called upon to make factual determinations and thus adjudicate"; this dual role has long been accepted as conditionally permissible. We have pointed out before,

and we reemphasize here, that adjudicatory determinations by such ugencies are not judgments or decrees, *see Dal Maso v. County Commrs.*, 182 Md. 200, 205, 34 A.2d 464, 466 (1943); that such an agency ascertains questions of fact and applies the law to those facts in a particular case does not alone vest it with judicial power in the constitutional sense. *See County Council v. Investors Funding*, 270 Md. 403, 429-32, 312 A.2d 225, 239-41 (1973); *Heaps v. Cobb*, 185 Md. 372, 378-79, 45 A.2d 73, 76 (1945); *Dal Maso v. County Commrs., supra* at 205 [466]; *Solvuca v. Ryan & Reilly Co.*, 131 Md. 265, 284, 101 A. 710, 716 (1917). We have denominated this function of an administrative agency, exercised in the performance of permissibly-delegated duties, quasi-judicial. *Dep't of Nat. Res. v. Linchester, supra* at 222, 223 [522].

While the appellees protest that the statute vests judicial power in an administrative agency, we observe preliminarily that it is clear that such a formulation of the Act's consequences is inaccurate, for the simple reason that the entity assertedly performing the judicial function — the arbitration panel, and not the Health Claims Arbitration Office — is not an administrative agency in the traditional sense. As earlier described, the malpractice claims statute creates a "unit in the Executive Department" denominated the Health Claims Arbitration Office; the primary function of that office, in addition to providing a mechanism for the service of claims and various other papers on the affected parties and for the filing in court of panel decisions that have not been rejected, is to assist the parties in the selection of u panel of arbitrators in order that the precondition to court litigation imposed by the Act may be met. We summarize our earlier description of that selection procedure: The director of the Arbitration Office delivers to the parties a list of fifteen potential arbitrators (five from each of the three categories) chosen at random from lists which the director prepares and maintains, §§ 3-2A04(b) & 3-2A03(c); the latter lists must include those persons on

the American Arbitration Association list of arbitrators who are willing to serve. § 3-2A03(c). The parties have an opportunity to object for cause to the inclusion of any arbitrator on the list of fifteen;[10] the claimant and the health care provider may also each peremptorily strike two names in each category, § 3-2A04(c), and the director then selects, from the lists returned to him, the first mutually agreeable person in each category. § 3-2A04(d). It only remains to add that the parties may, if they choose, agree in writing upon a single arbitrator and so advise the director. § 3-2A04(e). The arbitration panels so selected are not in any respect a part of the Health Claims Arbitration Office. The office's director refers the claim to the panel selected — or to a single arbitrator agreed upon by the parties — and the arbitration panel, when it has made an award, delivers it in writing to the director, § 3-2A05(a) & (f), but there is no other nexus between the panel and the arbitration office. The arbitrators are not a part of the office's staff; they are paid by the parties themselves, and not by any governmental unit; they serve purely on a voluntary basis; and they meet to consider a single claim and then disband. They are thus in no sense a typical organ of government.

Since the arbitrators are obviously not a part of the executive unit created by the Act, it becomes plain that the unit so created — the Health Claims Arbitration Office — exercises no judicial function whatever.[11] That all this is so is not, as we shall see, the end of the matter. From it one must conclude, however, that it is

[10] If the director determines that there is a reasonable basis for a party's objection to a given arbitrator, he replaces the name of that arbitrator with another. § 3-2A04(c). The director is also responsible for assuring himself, before the randomly-selected names are delivered to the parties, that no arbitrator on the list has a personal or economic relationship with a party which could form a basis for partiality on his part. § 3-2A04(b).

[11] It is thus unnecessary in this case that we pause to consider the extent to which the office and its activities are subject to administrative law principles.

analytically inaccurate to frame the inquiry in terms of whether the statute has vested judicial power in an administrative agency, thus violating the prohibition against the exercise by one entity of the functions of two departments of government. Properly posed, the question is not one implicating administrative law principles, but is simply whether judicial power has been vested in an entity which is not a court, contrary to the dictates of Article IV, section 1.

As we have have already dismissed the notion that judicial power in the constitutional sense is necessarily exercised whenever facts are determined and legal principles are applied to the facts found, we must ascertain what qualities imbue such determinations with judicial power. While we have not, until today, explicitly stated the proposition, we agree with those courts which have said that the essence of judicial power is the final authority to render and enforce its judgments, *see, e.g., Cedar Rapids, Etc. v. Cedar Rapids Commun. Sch.,* 222 N.W.2d 391, 396 (Iowa 1974); *Underwood v. McDuffee,* 15 Mich. 361, 368 (1867); *Breimhorst v. Beckman,* 227 Minn. 409, 35 N.W.2d 719, 733 (1949), * * * and we think that conclusion is implicit from our own case law. *See County Council v. Investors Funding,* 270 Md. 403, 437, 312 A.2d 225, 243 (1973) (Commission's determinations not final, but always open to judicial review; it makes no "'binding judgments' of the kind that denote strictly judicial power"; it has no power to force compliance with its orders); *Dal Maso v. County Commrs.,* 182 Md. 200, 205, 34 A.2d 464, 466 (1943) (decisions of administrative agencies not judgments or decrees). As we said in *Solvuca v. Ryan & Reilly Co.,* 131 Md. 265, 282, 101 A. 710, 715 (1917), and have repeated many times, *see, e.g., Reyes v. Prince George's County,* 281 Md. 279, 297, 380 A.2d 12, 22 (1977); *Shell Oil Co. v. Supervisor,* 276 Md. 36, 45-46, 343 A.2d 521, 526 (1975), "It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment. It must be the exercise of discretion and judgment within the subdivision of the sovereign power which belongs to the judiciary. . . ." It is elementary that an entity does not exercise the sovereign power of the State constitutionally assigned to the judiciary if its decision is in *no* sense final, binding or enforceable; no power of any meaningful kind — to say nothing of *sovereign* power — inheres in a decision which, as in the Act before us, need not be accepted and which, if accepted, cannot be enforced by the entity which made it.

Here the statute merely requires that malpractice claims be submitted to nonbinding arbitration before suit may be filed.[12] The decision of the panel is not — or need not be — in any sense a final determination of the controversy. Either party may reject the panel's determination, for any reason or no reason, and proceed, as he could have before the statute was enacted, to have the matter determined in an appropriate Article IV court of law. Even if the parties accept the decision of the arbitrators, the panel which made it cannot enforce it.[13] We think it evident that the panels

[12] Arbitration is simply a method of dispute resolution alternative to the invocation of the judicial process, and the idea that persons could, by agreement, submit a dispute to arbitrators for resolution has long been accepted in Maryland — it is in fact "familiar to the law since its earliest history," Shriver v. The State of Maryland, 9 G. & J. 1, 11 (1837), and "favored for the settlement of disputes." Parr Construction Co. v. Pomer, 217 Md. 539, 543, 144 A.2d 69, 72 (1958). We cannot conceive of any theory by which such a process, when it is imposed by statute as a precondition to court action, can by that fact alone be transposed into a judicial function.

[13] That the award of the arbitration panel "shall" be confirmed when filed with the circuit court, if it is accepted by the parties, and upon confirmation becomes a final judgment, *see* §§ 3-2A05(h) & 3-2A06(a), in no way alters our conclusion that the panel performs no function that is judicial in the constitutional sense. Precisely similar activity occurs when judgment is entered pursuant to a settlement agreed to by the parties. It is the agreement — here, the failure to reject the award — which allows the entry of judgment. As the highest court of Pennsylvania has said, "[A]n award made pursuant to compulsory arbitration is not

exercise no portion of the judicial power of this State in the constitutional sense.[14]

Authority in other jurisdictions is in accord with the proposition that a statutory requirement that disputes be submitted to a nonjudicial entity for determination itself a judgment," Weber v. Lynch, Pa., 375 A.2d 1278, 1283 (1977); that court noted further that "[t]he purpose of an appeal is to prevent judgment. When an appeal is taken the award becomes an undetermined cause which must be tried de novo and prosecuted to judgment, discontinuance, or non pros." *Id.* at 1283 n.7 (quoting Lanigan v. Lewis, 210 Pa. Super. 273, 277, 232 A.2d 50, 52-53 (1967)).

While it is true that parties to specific kinds of civil litigation in certain courts of this State may similarly reject that court's determination and proceed to a de novo appeal, *see* Md. Code (1974 & 1977 Cum. Supp.), §§ 12-401(c) & 12-502(a) of the Courts Article, a fundamental distinction lies in the fact that, if de novo proceedings are not elected, the court — unlike an arbitration panel — may enforce its own judgment.

[14] The function performed by the arbitration panels here, in respect to its nature, is not unlike that performed by masters in chancery. (That office once existed under the inherent jurisdiction of the chancery court, and masters now may also be appointed pursuant to the constitutional provision (Art. IV, § 9) allowing judges to appoint officers for their respective courts. E. Miller, *Equity Procedure* § 555 at 653 (1897).) A master "hears evidence and then reports his findings of fact and his recommendations to the chancellor," Matter of Anderson, 272 Md. 85, 106, 321 A.2d 516, 527 (1974), *cert. denied,* 421 U.S. 1000 (1975), and we have said that while a master's report is only advisory, full consideration should be given to it and findings of fact left undisturbed unless clearly erroneous. Bar Ass'n v. Marshall, 269 Md. 510, 516, 307 A.2d 677, 680 (1973). Just as in the case of a master, "no one would contend that the recommendation made by [him] after a hearing . . . constitutes a final determination of the matters there in dispute," Matter of Anderson, *supra* at 105 [527], so it is here — it is open to either party to "reject an award for any reason." § 3-2A06(a). And just as a master "is a ministerial officer, and not a judicial officer," and "under the Maryland Constitution a master is entrusted *with no part of the judicial power of this State,*" Matter of Anderson, *supra* at 106 [527] (emphasis added), it cannot be otherwise here.

prior to court action is not an unconstitutional delegation of judicial power.[15] *Eastin v. Broomfield,* 116 Ariz. 576, 570 P.2d 744, 750 (1977) (statutory requirement that malpractice claims be submitted to medical liability review panel prior to court action); *Prendergast v. Nelson,* 199 Neb. 97, 256 N.W.2d 657, 666-67 (1977) (same); *State ex rel. Strykowski v. Wilkie,* ___ Wis. ___, 2d, 261 N.W.2d 434, 448-49 (1978) (same); *Thornbrough v. Williams,* 225 Ark. 709, 284 S.W.2d 641, 644 (1955) (upholding statute allowing employer or employee to require dispute over wages earned to be decided by Commissioner of Labor, with either party having right to refuse to accept the finding and proceed at law);[16]

[15] The appellees make much of this State's unique position as compared to the federal government and most of our sister states with regard to its constitutional provisions concerning the separation of powers, arguing that because most state constitutions, unlike Maryland's, do not expressly confine judicial power to enumerated courts, nor expressly forbid persons exercising the functions of one branch to exercise those of another, decisions from other jurisdictions are neither applicble nor persuasive. For this proposition they chiefly cite Judge Barnes' dissenting opinion in County Council v. Investors Funding, 270 Md. 403, 447-51, 312 A.2d 225, 249-51 (1973). Since the separation of powers principle is "expressly or impliedly recognized in the basic law of every state in this nation," Dep't of Nat. Res. v. Linchester, 274 Md. 211, 218, 334 A.2d 514, 520 (1975), we are not convinced that the mere absence of express provisions similar to ours is of any substantial significance; thus decisions of our sister states on the issue are relevant. However, we need not here belabor the question since it is obvious that we have repeatedly upheld, as have all other states, "the delegation to administrative agencies of some of the types of adjudications historically performed by courts . . . . ," Shell Oil Co. v. Supervisor, 276 Md. 36, 47, 343 A.2d 521, 527 (1975), and that in so doing we have cited principles similar to those we apply here in finding no violation of the separation of powers. *See* County Council v. Investors Funding, *supra* at 437 [243] (non-finality of decisions; lack of power to force compliance).

[16] It should be noted that Article 4 of the Arkansas Constitution specifically prohibited each department of Government from exercising any power belonging to either of the others except as expressly permitted in the constitution, and Article 7 of that document vested judicial power in enumerated courts and justices of the peace, with jurisdiction

Collier & Wallis v. Astor, 9 Cal. 2d 202, 70 P.2d 171, 173-74 (1937) (upholding statute empowering labor commissioner to determine disputes between employment agency and applicants, with right to trial de novo in superior court). *But see In re Opinion of the Justices,* 87 N.H. 492, 179 A. 344, 357 (1935). Often cases involving the constitutionality of arbitration statutes do not even mention the question of separation of powers. *See, e.g., Application of Smith,* 381 Pa. 223, 112 A.2d 625 (upholding statute permitting courts to adopt rules providing for compulsory arbitration of civil suits involving $1,000 or less with de novo appeal), *appeal dismissed sub nom. Smith v. Wissler,* 350 U.S. 858 (1955). The general rule with regard to compulsory arbitration — arbitration to which the consent of at least one of the parties is enforced by statutory provisions, *see Wood v. Seattle,* 23 Wash. 1, 62 P. 135, 143 (1900) — appears to be that coercive statutes which close the courts to litigants by compelling resort to arbitrators for final determination of rights are invalid, whereas statutes which aid the courts by providing for arbitration but reserving a right to appeal to a court are generally valid. 5 Am. Jur. 2d *Arbitration and Award* § 9, at 526 (1962). *See generally* Annot., 55 A.L.R.2d 432 (1957). That, of course, is entirely in accord with our conclusions here.

Finally, we would be remiss if we did not mention that the Supreme Court of Illinois has recently concluded, contrary to our determination in this case, that legislation requiring submission of malpractice claims to a medical review panel similar to those created here, but with a circuit judge a member of each panel, prior to trial of the case, unconstitutionally vested judicial functions in nonjudicial personnel. *Wright v. Central Du Page Hospital Association,* 63 Ill. 2d 313, 347 N.E.2d 736 (1976). The court there, however, said no more than that the application of principles of law is inherently a judicial function, and that the

to hear and determine private contractual rights vested exclusively in certain of those courts. *See* Thornbrough v. Williams, 225 Ark. 709, 284 S.W.2d 641, 643, 646 (1955).

nonjudicial members of the panel were empowered to exercise it. *Id.* at 739-40. We find that rationale, in view of all the considerations we have discussed above, singularly unpersuasive.

II.

Having concluded that Article IV of the Maryland Constitution and Article 8 of its Declaration of Rights do not prevent the General Assembly from requiring as a condition precedent to a civil suit that the litigants attempt to resolve their dispute by submitting it to an arbitral panel before presenting the controversy to a court for resolution, we proceed to analyze the contention that such a requirement nonetheless violates other rights secured by our State and the federal constitutions. The trial court found that the Act imposes procedural and monetary impediments — substantial expense in producing expert witnesses before the arbitrators, significant lengthening of the time necessary to achieve a final judicial resolution of the claim, and the necessity of overcoming the presumption of correctness which attaches to the arbitral decision at the subsequent trial — calculated to inhibit a claimant from pursuing court action in the face of an adverse arbitral award, and that these impediments "deny a claimant reasonable access to the courts and his attendant constitutional right to trial by jury." Two of the appellees, the Johnsons, urge that it is the presumption of correctness which effectively vitiates the right to trial by jury secured by Article XV, section 6 of the Maryland Constitution, and that for many potential litigants the financial burden and delay associated with the arbitration process effectively bar the access to the courts which is guaranteed by Article 19 of the Declaration of Rights. See also Md. Decl. of Rts., Arts. 5 & 23. The remaining appellee, the Bar Association, suggests that the Act deprives a claimant of trial by jury and of access to the courts by virtue of a number of "infringements" which, though if taken singly may not amount to constitutional transgressions, when considered as a composite whole do just that: admissibility of the arbitration panel's decision

together with the presumption that it is correct; failure to allow the claimant to attack the panel decision before the jury on grounds that it was procured by corruption, fraud, undue means, or partiality; failure to allow voir dire of the arbitration panel; costs and delay imposed before access to the courts can be gained; and control of attorney fees. We perceive, however, no deprivation of either trial by jury or access to the courts on any of these grounds, considered either individually or collectively. The whole here is no more unconstitutional than its individual parts; we therefore treat the challenges to the statute on this aspect of the case seriatim.

Maryland's Constitution, Article XV, section 6, which provides that "[t]he right of trial by Jury of all issues of fact in civil proceedings . . . shall be inviolably preserved," like the seventh amendment to the Constitution of the United States, requires that "enjoyment of the right . . . be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." *In re Peterson,* 253 U.S. 300, 310, 40 S. Ct. 543, 64 L. Ed. 919 (1920) (Brandeis, J.). The appellees strenuously urge that, as to the second of these commands, the admissibility of the panel's award together with its presumption of correctness "virtually deprive the jury of its constitutional function." To buttress this assertion, the appellees point to only two cases, *Comiskey v. Arlen,* 45 U.S.L.W. 2019 (N.Y. Sup. Ct. Queens County July 2, 1976), and *Simon v. St. Elizabeth Medical Center,* 355 N.E.2d 903, 907-08 (C.P. Ohio 1976), both involving malpractice statutes permitting the admission of the decisions of screening or arbitral panels at a subsequent trial, both decided by trial courts, both of which cite no authority to support their conclusions, and one of which has been overruled on appeal. *See Comiskey v. Arlen,* 55 App. Div. 2d 304, 390 N.Y.S.2d 122, 125 (1976) (thrust of decision below was unwarranted assumption that "no jury could evaluate a medical malpractice panel's recommendation with objectivity, or follow a trial court's instructions regarding the weight to be given it"). The law is

clearly contrary to the appellees' contention. For recent cases of our sister states holding that statutory provisions allowing the admissibility into evidence of the findings of medical malpractice review panels are in essence simply rules of evidence and do not violate the right to jury trial, see *Eastin v. Broomfield,* 116 Ariz. 576, 570 P.2d 744, 748-49 (1977); *Prendergast v. Nelson,* 199 Neb. 97, 256 N.W.2d 657, 665-66 (1977); *State ex rel. Strykowski v. Wilkie,* ___ Wis. 2d ___, 261 N.W.2d 434, 450-53 (1978).[17]

[17] Noting that admission of the award is intended to deter resort to retrial, and that such deterrence imposes a burden on the right to jury trial, one commentator has urged courts to consider, in determining whether the burden is permissible, the function of admitting the award:

> Admissibility is intended to discourage either party from failing to present a complete case at arbitration in hopes of vindication at trial. By encouraging thorough presentation of the case at arbitration the provision promotes final resolution of the claim in one stage (arbitration) rather than two (arbitration and trial). Resolution in a single stage would permit the parties to realize the cost savings attributable to arbitration. Such savings and the presumably fair results in most cases will cause most parties to conclude that a jury trial is not desirable. Only in the relatively rare case where there remains hope for a different verdict at trial will the admissibility of the award affect the jury's role, and in those cases the lawyer may be able to neutralize the effect of the award. Admissibility of the award thus plays an important part in making the entire plan work and results in only a relatively insignificant or possibly non-existent intrusion on the domain of the jury. [Note, *Medical Malpractice Arbitration: A Comparative Analysis,* 62 Va. L. Rev. 1285, 1303-04 n.110 (1976).]

That same commentator has suggested that the Maryland statute, by requiring the challenger to prove the award incorrect, may deprive him of an opportunity for a jury determination on the issues of liability and damages. *Id.* at 1305. No explanation of why this might be so is offered, however. . . . . The commentators generally agree that admissibility of a panel award does not deny the right to jury trial. *See* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications,* 55 Tex. L. Rev. 759, 793 (1977) ("merely another piece of

We begin by pointing out exactly what the statute provides in this regard: that the award is admissible as evidence, that it "shall be presumed to be correct, and [that] the burden in on the party rejecting it to prove that it is not correct." § 3-2A06(d). The effect of this provision is precisely the same as occurs under the Workmen's Compensation Act, which provides that the Commission's decision is "prima facie correct and [that] the burden of proof shall be upon the party attacking the same." Md. Code (1957, 1964 Repl. Vol.), Art. 101, § 56(c). We long ago said that the latter provision means that the Commission's solution of the conflict "*is presumed to be correct,* and the burden of proof is upon the party attacking it to show that it was erroneous." *Moore v. Clarke,* 171 Md. 39, 45, 187 A. 887, 890 (1936) (emphasis added). "[I]t simply puts the burden of proof upon the party taking the appeal, whether he be plaintiff or defendant. In other words *it establishes no new rule when the plaintiff happens to be the party appealing,* as the burden was always upon the plaintiff to prove his case." *Stewart & Co. v. Howell,* 136 Md. 423, 434, 110 A. 899, 902 (1920) (emphasis added).[18] We have further explained that the provision "means nothing more than that, if the mind of the trier of facts is in equal balance on the evidence in the record, the finding of the Commission should be affirmed." *Blake Construction v. Wells,* 245 Md. 282, 286, 225 A.2d 857, 860 (1967). When the malpractice claimant is the party

evidence for the jury to consider"); Lenore, *Mandatory Medical Malpractice Mediation Panels — A Constitutional Examination,* 44 Ins. Counsel J. 416, 422 (1977) (same).

[18] Except in the comparatively rare situation in medical malpractice cases where contributory negligence or assumption of risk is an issue, the only change in the burden of proof at trial will thus occur when the health care provider appeals an award against him by the arbitration panel — there, essentially, the defendant must prove that the award finding him liable and assessing damages was not correct — *i.e.,* that he was not negligent. While we think it clear that the legislature may alter the burden of proof, the appellees as plaintiffs below would not in any event be able to demonstrate prejudice in this regard. *See* McBriety v. Baltimore City, 219 Md. 223, 233, 148 A.2d 408, 415 (1959).

appealing, the statutory provision thus has no effect whatever on his burden of proof in respect to primary negligence.

That the legislature may, in any event, pass rules affecting the burden of proof without infringing the right to jury trial is not to be doubted, as is evident from both our own case law and decisions of the Supreme Court of the United States. In *Bonaparte v. M. & C. C. of Balto.,* 131 Md. 80, 86, 101 A. 594, 596 (1917), we assessed the validity of a provision of a city charter making a monetary award to a property owner by the Commissioners for Opening Streets prima facie evidence at a subsequent condemnation trial of the correctness of the amount of damages awarded, and placing the burden of proof on the party asserting that the amount should be more or less than that awarded by the Commissioners. We rejected the suggestion that this provision violated section 40 of Article III of the Maryland Constitution requiring the payment of just compensation, if not agreed upon by the parties, to be awarded by a jury:

> The appellant's right to a jury trial, upon the question as to the compensation to be awarded him for the property condemned . . . is not prejudiced by the [charter provision]. The purpose of [that provision] is simply to attach the presumption of correctness to the report of the Commissioners, as against an appeal by either the city or the property owner. This regulation is entirely consistent with the right afforded the owner to prove, and with the duty imposed upon the jury to determine, the true amount of the just compensation to be awarded. [*Id.*]

And in *Meeker v. Lehigh Valley R. Co.,* 236 U.S. 412, 430, 35 S. Ct. 328, 59 L. Ed. 644 (1915), the Supreme Court concluded that a statutory provision making the "findings and order of the [Interstate Commerce] Commission . . . prima facie evidence of the facts therein stated" in a subsequent civil suit to enforce

payment as directed in the Commission's order did not infringe the right of trial by jury. The Court said:

> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law. . . . An instructive case upon the subject is Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381 [(1877)], where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor prima facie evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence, and in nowise inconsistent with the constitutional right of trial by jury. [*Id.*]

See In re Peterson, 253 U.S. 300, 309-11, 40 S. Ct. 543, 64 L. Ed. 919 (1920) (seventh amendment does not prohibit introduction of new rules of evidence, and admission of auditor's report as prima facie evidence does not modify right of jury trial; an order of a court, "like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity"). *See also Montchester v. Honga River,* 257 Md. 79, 262 A.2d 312 (1970).

Despite what the Bar Association concedes to be "substantial authority" for the proposition that no constitutional infirmity ordinarily inheres in according a presumption of correctness to findings introduced at a later de novo trial, it nonetheless insists these authorities are unpersuasive as to the case at bar, asserting that here no "real" de novo trial is permitted.[19] Its

[19] The Bar Association also suggests that many of the cases supporting the proposition that a presumption of correctness in subsequent proceedings is permissible — workmen's compensation and administrative law cases — are inapposite since they involve situations in which the legislature would not have been required to provide a jury

position is apparently premised on the fact that the panel's award may not be attacked before the jury on the basis that (1) it was procured by fraud, corruption, or other undue means, (2) there was partiality, corruption, or misconduct on the part of an arbitrator; (3) the arbitrators exceeded their powers, or (4) the arbitrators conducted the hearing in such a manner as to prejudice substantially the rights of a party. Instead, these bases for rendering the award inadmissible in evidence are presented by preliminary motion and decided by the trial judge. *See* § 3-2A06(c) & (d). How the fact that the trial judge determines the admissibility into evidence of the award deprives the claimant of a de novo trial of his malpractice claim eludes us completely. For an analogous situation where the Court determined in a land boundary dispute whether a commission's earlier boundary determination conducted pursuant to statute was properly made, so as to permit consideration by the jury in a subsequent judicial proceeding, see *Montchester v. Honga River, supra* at 85-87 [315-16]. Juries do not normally determine whether evidence is admissible, and we know of no reason why they should do so here. Nowhere does the Act preclude the parties in the trial of the case from presenting whatever evidence and making whatever arguments on the merits of the claim they might have made had there been no pretrial arbitration. That the jury does not consider whether the trial in *any* event. And indeed our predecessors in Branch v. Indemnity Ins. Co., 156 Md. 482, 489, 144 A. 696, 698 (1929), said; "Unless we were disposed to disregard the trend of our own decisions, and those of other courts in analogous cases, we could not conclude that a provision for jury trial on issues of fact is essential to the validity of the Workmen's Compensation Act of Maryland." However, the appellees ignore the fact that the federal cases cited are precisely on point since

> [the Seventh] Amendment [to the Federal Constitution] requires trial by jury in [federally-created] actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty. [Pernell v. Southall Realty, 416 U.S. 363, 375, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974).]

panel finding was infected with fraud, partiality or the like has no relevance whatever to whether the parties receive that to which they are entitled — a de novo jury trial of the malpractice claim.

The appellees next assert that claimants are denied due process by the failure of the statute to provide an opportunity to conduct a voir dire examination of prospective members of the arbitration panel, so as to assure their freedom from bias and partiality. No authority is cited to support this proposition and we know of none; in fact, voir dire examination is not provided for in connection with most, if not all, panels, boards, commissions and the like. The Act requires the director of the Health Claims Arbitration Office, who is responsible for preparation of a list of qualified persons willing to serve as arbitrators, § 3-2A03(c), to assure himself that persons on the randomly chosen list delivered to the parties have no personal or economic relationship with either party, § 3-2A04(b); it allows a party to object, and state reasons for doing so, to the inclusion of any arbitrator, and if the director finds there is a reasonable basis for the objection it requires him to replace the name of that arbitrator with another, § 3-2A04(c); it allows a party to strike, without reason, two of the five potential arbitrators in each category (physicians, attorneys, and general public), § 3-2A04(c); *see* § 3-2A04(b); it requires the director to include a biological statement for each of the potential arbitrators on the list delivered to the parties, § 3-2A04(b); and finally, it permits the award to be vacated by the trial judge on the ground, among others of "evident partiality by an arbitrator," in which event the case is tried as if there had been no award. § 3-2A06(c); *see* Md. Code (1974), § 3-224(b)(3) of the Courts Article. In addition, as we have already pointed out, a party is at liberty to reject the arbitration award for any reason and have the claim tried by a jury. We perceive no denial of due process. *See State ex rel. Strykowski v. Wilkie,* ___ Wis. 2d ___, 261 N.W.2d 434, 446 (1978).

With this conclusion of the matters bearing on the question whether the statute violates the right to jury trial by interfering with the jury's determination of issues of fact, we come to what may be viewed as the determinative question on this branch of the case — whether the additional expense and delay, which are inevitable in every case in which court proceedings are elected after the arbitral decision, unconstitutionally deny malpractice claimants access to the courts as guaranteed by Article 19 of our Declaration of Rights [20] and thus the right to jury trial which accompanies resort to the judicial process in this type of civil case. *See* Md. Const., Art. XV, § 6. One commentator has suggested that this is the most serious constitutional difficulty posed by screening panels: that requiring a plaintiff "to proceed through an expensive and prolonged screening process prior to an actual judicial hearing effectively denies him the right of access to the courts guaranteed by many state constitutions." Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications,* 55 Tex. L. Rev. 759, 795-96 (1977). The few appellate courts which have considered the question in terms of expense have concluded that reasonable restrictions on the right of access may be prescribed by law, and that the exercise of the police power for the benefit of public health by an effort to reduce the cost of malpractice insurance, and ultimately medical expenses, is constitutional. *Carter v. Sparkman,* 335 So. 2d 802, 805-06 (Fla. 1976), *cert. denied,* ___ U.S. ___, 97 S. Ct. 740 (1977); *State ex rel. Strykowski v. Wilkie,*___ Wis. 2d ___, 261 N.W.2d 434, 444 (1978). In reaching this conclusion, the Supreme Court of Wisconsin observed: "States are under no constitutional obligation to neutralize the economic disparities which inevitably make resort to

[20] Article 19 provides: "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land."

the courts different for some plaintiffs than others." *Id.* A concurring opinion in *Carter,* noting that it was troublesome that malpractice plaintiffs may be put to the expense of two full trials on their claims and that the inequity was harsh for the category of claimants with limited resources, concluded that the statute could not be invalidated on that basis, since "[a] disparity of resources has always been an imbalance in litigation which the courts are relatively powerless to adjust." *Id.* at 807-08. *See Prendergast v. Nelson,* 199 Neb. 97, 256 N.W.2d 657, 663-64 (1977) (requirement of submission to medical review panel in no way precludes access to the courts for a final determination).[21]

We find ourselves bound to agree with the assessment made by the *Wilkie* court and by the concurring justice in *Carter.* The "law of the land" in Article 19 is the same due process of law required by the fourteenth amendment, *Matter of Easton, Incompetent,* 214 Md. 176, 187, 133 A.2d 441, 447 (1957), and we simply cannot conclude that the additional expense and delay mandated by this malpractice claims statute is so unreasonable in relation to its legitimate goal that it contravenes due process. When we recall that there is no vested interest in any rule of the common law, *Munn v. Illinois,* 94 U.S. (4 Otto) 113, 134, 24 L. Ed. 77 (1877), so that the common law "may be abrogated or changed as the General Assembly may think most conducive to the general welfare," *The State v. Buchanan et al.,* 5 H. & J. 317, 366 (1821) (concurring opinion), it becomes apparent that there is here no denial of the due process right of access to the courts by the addition of a mode of procedure which merely causes some delay and increases the expense for a litigant who takes his claim to court, since there is no deprivation of any vested

[21] For a procedure not unlike that provided in the Act, see Md. Code (1977), §§ 8-326 to 8-329 of the Transportation Article (establishing property review boards to fix value of land being condemned for highways purposes, with de novo court determination if any party is dissatisfied with the award).

property right. *See, e.g., Thompson v. Mazo,* 245 A.2d 122, 124 (D.C. 1968) (bond or undertaking as condition precedent to asserting a right may place heavier, and sometimes impossible, burden on one of limited means, but such burdens are valid and reasonable when required to protect rights of public); *Montgomery v. Daniels,* 38 N.Y.2d 41, 378 N.Y.S.2d 1, 17-18, 340 N.E.2d 444, 456 (1975) ("no fault" law denying right to seek recovery for some injuries does not deny federal constitutional right of access to courts, since access for resolution of rights not subject to special constitutional protection may be denied if rational basis therefor); *Singer v. Sheppard,* 464 Pa. 387, 346 A.2d 897, 902-04 (1975) ("no fault" law eliminating tort remedy for certain accident victims does not deny access to courts as guaranteed by state constitution); *Behrns v. Burke,* ___ S.D.___, 229 N.W.2d 86, 88 (1975) (guest statute does not deny access to courts since injuries suffered by guest are not recognized as a wrong for which the law affords a remedy). It is thus clear that since the restriction imposed by the Act is reasonable[22] — as will be even more apparent from our later discussion of reasonableness in the context of the equal protection

[22] Professor Redish concludes, and we tend to agree, that despite the Florida court's warning that a claimant's prelitigation burden "reaches the outer limits of constitutional tolerance," Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976),

> courts should recognize that the preparation prior to screening panel review in most cases functions merely as an accelerated form of discovery for the actual trial. Certainly a state may provide for a variety of discovery devices and a pretrial hearing without running into constitutional trouble. If a legislature intends the screening panel procedure to function as an institutionalized attempt to encourage settlement, and the physical and financial burdens it imposes on potential plaintiffs [are] kept to a minimum, the constitutional obstacles should not prove insurmountable. [Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications,* 55 Tex. L. Rev. 759, 796 (1977).]

challenge to the statute — the Act cannot be invalidated simply because it makes access to the courts more expensive.

When access to the courts is regulated or limited in some manner, of course, at the same time that regulation or limitation *ipso facto* acts upon the right of trial by jury which accompanies resort to the courts,[23] and which is separately guaranteed by Article XV, section 6 of the Maryland Constitution, as well as by Article 5 of the Declaration of Rights. We must therefore also ascertain whether that right can be said to be violated by the precondition imposed here on access to the courts. As we observed earlier, the jury trial guarantee, in addition to requiring that there be no interference with the jury's determination of issues of fact, commands that the right "be not obstructed." *See In re Peterson,* 253 U.S. 300, 310, 40 S. Ct. 543, 64 L. Ed. 919 (1920). There is no obstruction, however, and appellees do not suggest otherwise, simply because the right is subjected to regulation. Thus, our predecessors in *Knee v. City Pass. Ry. Co.,* 87 Md. 623, 627, 40 A. 890, 892 (1898), observed:

> This common law practice [a stay of proceedings in a second action until the costs of a former action are paid], antedating our Constitution and Declaration of Rights, led naturally and almost inevitably . . . to the enactment of statutes . . . having for their object the just regulation of the right of trial by jury. . . . [I]t is gratifying to note with what sound and wise discrimination, in the main, the Courts have dealt with the subject, always preserving unimpaired the ultimate historical right as it existed at the time of our separation from the mother country, while sustaining all reasonable regulations of the exercise of that right made in the interest of the general public.

[23] Once access to the courts is gained, of course, a reading of the Act makes plain that the jury trial in those court proceedings is subjected to no additional or separate burden of any kind as a precondition to its exercise.

We find that our analysis of the reasonableness of this Act's regulation of the jury trial right — by virtue of its regulation of access to the courts generally — begins and ends with a proposition long ago announced by our predecessors as "fully established": that "where a law secures the trial by jury upon an appeal, it is *no violation of a constitutional provision for guarding that right,* although such law may provide for a primary trial without the intervention of a jury." *Steuart v. Baltimore,* 7 Md. 500, 512 (1855) (emphasis added), *quoted in Bringe v. Collins,* 274 Md. 338, 347 n.3, 335 A.2d 670, 676 n.3 (1975). In *Knee v. City Pass. Ry. Co., supra* at 625 [891], the Court stated that in the primary trial without jury approved in *Steuart,* "costs are incurred which must abide the final result on appeal, and which to that extent constitute an additional burden affixed to the right of trial by jury, *but that does not afford a test of the validity of the Act."* (Emphasis added.) The *Knee* Court endorsed the view that the guarantee

> is not violated "where the right of trial by jury is preserved before the final decision, in all cases where it would have existed at the time of the adoption of the Constitution, and where all contested issues of fact are determined by a jury and in no other way; and . . . *any legislation therefore which merely points out the mode of arriving at this object, but does not rob the right of its essential ingredients,* cannot be considered an infringement of the right." [*Id.* at 633 [894] (citing *Smith v. Times Pub. Co.,* 178 Pa. 481, 36 A. 296 (1897)) (emphasis added).[24]]

[24] That a compulsory reference to an auditor prior to court consideration is not an infringement of the right to a jury trial where either party may demand a jury trial at the court hearing if he is dissatisfied with the report of the referee is recognized in Knee v. City Pass. Ry. Co., 87 Md. 623, 631-32, 40A. 890, 894 (1898), and seems to be a generally accepted doctrine of law. *See* 50 C.J.S. *Juries* § 118, at 832-33 (1947). Also generally recognized is the principle that where the right of trial by jury in civil cases is secured by allowing an appeal to a court where such trial can be had, the exercise of

We think the analogy is compelling. It is perfectly plain that we could not, without repudiating *Steuart* and *Knee,* conclude that a system of compulsory arbitration, which permits trial by jury on rejection of the award, by itself in any way infringes the constitutional right to a jury trial. That is to say, *Steuart* and *Knee* compel the conclusion that the mere subjection to the arbitration procedure, analogous to a "primary trial without the intervention of a jury," is not *itself* an impermissible burden on the right.[25] We note particularly the language of the Supreme Court of Pennsylvania, upholding a statute permitting courts to adopt rules providing for compulsory arbitration, with de novo appeal, of civil suits involving $1,000 or less:[26]

the right by appealing cannot be unreasonably impaired, though conditions and regulations may be prescribed by the legislature. *See id.* § 119, at 833.

[25] To conclude otherwise would require us to differentiate among causes of action and hold that, while the expense and delay necessitated by two trials is a permissible burden on the jury trial right in the case of small claims, it is impermissible in a malpractice case where the damages sought are often very great and where the cost of trying the case is higher than usual because of the frequent necessity for expert witnesses. This we will not do. We can discover no reasoned basis, and the appellees suggest none, for determining that a constitutional right to trial by jury without the intervention of any preliminary proceeding exists if the amount of money involved in the action is large enough — nor, if we could, do we perceive where the line might be drawn. Even malpractice causes of action themselves vary substantially in the amount of damages sought and the kind of proof necessary to be adduced. Furthermore, the ratio of cost to value of a small claim subjected to two proceedings may well be greater than that of a large malpractice claim. We are, in short, unpersuaded of the reasonableness of creating *ad hoc* exceptions to the principle stated in *Steuart. See* State ex rel. Strykowski v. Wilkie, ___, Wis. 2d ___, 261 N.W.2d 434, 449-50 (1978).

[26] The statute has since been amended to include cases in which the amount in controversy is less than either $5,000 or $10,000, depending on the classification of the county. *See* Weber v. Lynch, ___ Pa. ___, 375 A.2d 1278, 1279 n.1 (1977).

> [The right to trial by jury is violated] only where the statute closes the courts to litigants and makes the decision of the arbitrators the final determination of the rights of the parties; therefore there is no denial of the right of trial by jury if the statute preserves that right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal. In . . . Capital Traction Co. [v. Hof, 174 U.S. 1, 23, 19 S. Ct. 580, 43 L. Ed. 873 (1899)] it was said, . . . : "It [the Constitution] does not prescribe at what stage of an action a trial by jury must, if demanded, be had, or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it." The only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are *finally* determined. All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable. [*Application of Smith,* 381 Pa. 223, 112 A.2d 625, 629, *appeal dismissed sub nom. Smith v. Wissler,* 350 U.S. 858 (1955) (citations omitted).]

It only remains to ascertain whether the court proceeding, and hence the jury trial, following arbitration is subjected to any additional condition and, if so, whether that condition is so onerous as to make the right "practically unavailable." As a reading of the statute will make clear, the court proceeding with its jury trial is subjected to no regulation or burden of any kind as a precondition to its utilization. The statute does provide that the award of the arbitration panel must encompass an assessment of costs, including arbitrators' fees, § 3-2A05(e); it also provides, however, that the award may be rejected and a court action filed. § 3-2A06(a) & (b). The arbitral fees, we must assume, are then part of the final assessment of costs, and need not

be paid as a precondition to the court proceeding and thus the jury trial.[27] *See* § 3-2A06(e).

The appellees seem to argue, however, that the knowledge that these fees will have to be paid at some future point if the suit is lost is itself an unreasonable obstruction of the right to trial by jury. This, of course,

[27] Even were we to assume, however, that payment of the arbitrators' fees — here amounting to $140 per day as set by the director pursuant to section 3-2A03(d) of the Act — were a pre-condition to the court proceedings, it would not necessarily follow that an impermissible burden is thereby placed on the right to jury trial. It is settled law that the right may be subjected to reasonable regulation. Bettum v. Mont. Fed. S. & L. Ass'n, 262 Md. 360, 366, 277 A.2d 600, 603 (1971); Houston v. Lloyd's, 241 Md. 10, 14, 20-22, 215 A.2d 192, 194, 198-99 (1965). It has been recognized that it is not unreasonable to require the appellant to pay accrued costs and give recognizance for payment of costs which will accrue on appeal, *see* Application of Smith, 381 Pa. 223, 112 A.2d 625, 630, *appeal dismissed sub nom.* Smith v. Wissler, 350 U.S. 858 (1955), or to require appellant to furnish security for the prosecution of the appeal and satisfaction of the final judgment. Capital Traction Co. v. Hof, 174 U.S. ;1, 23, 19 S. Ct. 580, 43 L. Ed. 873 (1899). The *Smith* court, indicating that the problem was one of degree rather than of kind, concluded that requiring payment of arbitrators' fees as a precondition to the right of appeal would be invalid if the fee were $75 and the case involved only $250, and directed the courts to provide for a lower rate of compensation where comparatively small claims were involved. Application of Smith, *supra* at 630. Similarly, the New Hampshire Supreme Court indicated that where prepayment of arbitration costs as a condition of appeal could entail payment of $750 or $1,125 to obtain a jury trial of a case involving $3,000 or less, the precondition would amount to an unconstitutional infringement of the right to trial by jury. Opinion of the Justices, 113 N.H. 205, 304 A.2d 881, 887 (1973). The typical malpractice claim usually involves considerably greater sums, and always, if governed by the Act, more than $5,000. § 3-2A02(a). For a recent malpractice case holding that the privileges and immunities clause of the Arizona Constitution was violated by the portion of a statute requiring the posting of a $2,000 cost and attorney fee bond as a precondition to court action following an award by a medical review panel, see Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744, 753-54 (1977).

is the same argument which is rejected by the very principle that a preliminary proceeding is permissible. We risk redundance to refer again to the *Knee* Court's language: "In such primary trial, costs are incurred which must abide the final result on appeal, and which to that extent constitute an additional burden affixed to the right of trial by jury, but that does not afford a test of the validity of the Act." *Knee v. City Pass. Ry. Co., supra,* 87 Md. at 625, 40 A. at 891. The Court there quoted with approval *Beers v. Beers,* 4 Conn. 535, 539 (1823): "[T]he trial by jury . . . may be subjected to new modes, *and even rendered more expensive,* if the public interest demand such alteration." (Emphasis supplied in *Knee.*)

The appellees object as well to the delay entailed by requiring arbitration prior to trial, and in fact the trial court found that the time necessary to achieve a final judicial resolution of a claim if the arbitration panel's decision is rejected would be significantly lengthened. Delay, however, usually accompanies any two-step proceeding, and the same principles we have already set out support the conclusion that such delay does not unconstitutionally obstruct the court proceeding and the attendant right to trial by jury. *See In re Peterson,* 253 U.S. 300, 310, 40 S. Ct. 543, 64 L. Ed. 919 (1920) (requirement of preliminary hearing by auditor in suit for money due does not infringe constitutional right because it involves delay in reaching jury trial).[28]

Finally, as to this aspect of the appellees' multifaceted attack on the Act, we may quickly dismiss the suggestion that the statute's requirement that attorneys' fees in connection with the arbitral and judicial proceedings be approved by the arbitration panel and

[28] The Court in *Peterson,* 253 U.S. at 307, observed: "[S]uch a tentative trial acts as a sifting process by which misunderstandings and misconceptions as to facts are frequently removed. In the course of it many contentions or assumptions made by one party or the other are abandoned." It thus may well be that the delay involved in reaching jury trial will be offset somewhat by a shortening or streamlining of the trial itself.

the court respectively, *see* § 3-2A07, violates the due process clauses of the Maryland and federal constitutions. *See* Md. Decl. of Rts., Art. 23; U.S. Const. amend XIV. Appellees argue in this regard that the right to contract is both a liberty and a property right and may not be interfered with by legislation which is arbitrary and capricious and bears no real and substantial relation to its object. The short answer to the Bar Association's objection is simply that there is no deprivation of property — no interference with the right to contract — evident from the terms of the Act.[29] Nothing therein suggests that an attorney may not enter into a fee arrangement with his client — it merely subjects the arrangement to approval as to reasonableness by the panel and the court. The right to contract, as the appellees concede, is always subject to reasonable regulation, *see Loughran Co. v. Candy & Tobacco Co.*, 178 Md. 38, 44, 12 A.2d 201, 204 (1940), and that attorneys' fees are so subject is not open to doubt. *See Calhoun v. Massie*, 253 U.S. 170, 173-74, 40 S. Ct. 474, 64 L. Ed. 843 (1920); *cf. Mortgage Inv. v. Citizens Bank*, 278 Md. 505, 366 A.2d 47 (1976). Attorneys' fees are statutorily regulated under the Workmen's Compensation Act, Md. Code (1957, 1964 Repl. Vol.), Art. 101, § 57, and under the Unemployment Insurance Law, Md. Code (1957, 1969 Repl. Vol.), Art. 95A, § 16(b), and we have said as to the latter that lawyers who accept employment do so subject to the provisions of the act. *Davis v. Avnet*, 192 Md. 626, 630, 65 A.2d 308, 310 (1949). Similarly, attorneys' fees are limited under the Federal Tort Claims Act to twenty-five percent of any judgment rendered, and an attorney charging an amount in excess of that allowed is subject to fine and

[29] Section 3-2A07 reads:

> An attorney may not charge or collect compensation for legal services in connection with the arbitration of a claim under this subtitle unless it is approved by the arbitration panel. An attorney may not charge or collect compensation for legal services in connection with a judicial proceeding under this subtitle unless it is approved by the court.

imprisonment. 28 U.S.C. § 2678 (1970). The appellees offer no cogent argument why subjecting the fee to panel or court approval is facially unreasonable. *See Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657, 669-70 (1977) (approving statutory requirement that attorneys' fee arrangements in medical malpractice cases be subject to review by the court). The Bar Association's arguments in this regard are pure hyperbole.

Though we have thus concluded that the imposition of a nonbinding arbitration procedure as a precondition to resort to the courts is constitutionally permissible, we emphasize that this is so only so long as the legislature does not attach to that pretrial procedure conditions or restrictions, which do not exist here, so burdensome or oppressive as to make the right of access to the courts and the attendant right to jury trial "practically unavailable."

III.

The appellees' only remaining shot in their salvo upon the statute — the assertion that it deprives them of the equal protection of the laws in violation of the fourteenth amendment and of the due process clause of Article 23 of our Declaration of Rights[30] — misses the mark as well. In this regard we briefly delineate certain of the facts found by the trial court pertinent to this issue: (1) The evidence adduced at trial "abundantly demonstrated" that a "severe" medical malpractice insurance crisis existed in Maryland in 1974 when the dominant insurer received a dramatic rate increase but shortly thereafter decided to cease writing medical malpractice insurance in this State when it was refused

[30] We noted in Governor v. Exxon Corp., 279 Md. 410, 438 n.8, 370 A.2d 1102, 1118 n.8 (1977), that the Maryland Constitution does not expressly provide for the equal protection of the laws as does the United States Constitution. As we did there, we here assume for purposes of this appeal that Article 23 of the Declaration of Rights embodies that concept and that the same standard of review applies. *See id.*

an additional substantial increase;[31] (2) no new company entered the market in Maryland to fill the void created by the departure of the dominant insurer; (3) the instability of the insurance market continued even after the legislature's creation in 1975 of the Medical Mutual Liability Insurance Society of Maryland, *see* Md. Code (1957, 1972 Repl. Vol., 1977 Cum. Supp.), Art. 48A, §§ 548-556, an insurance company initially funded by a tax on Maryland physicians, which had alleviated the situation to some extent by making malpractice insurance available; (4) this statutorily-created company, insuring ninety percent of the physicians in Maryland, is an "admitted" carrier, whereas Mutual Fire, Marine & Inland Insurance Co., insuring that portion of the remaining ten percent not insured through policies carried by their employing hospitals, is a "surplus line" carrier, subject to virtually no regulation by the State, which could cancel policies without hearings before the Insurance Commissioner and whose rates were not subject to the Commissioner's approval;[32] (5) physicians could reasonably conclude that a "surplus line" carrier is a less desirable insurer than an "admitted" carrier; (6) the absence of any admitted carriers besides Medical Mutual in the State signifies the continued precariousness of the malpractice insurance market; (7) the report of the Medical Malpractice Insurance Study Committee, which recommended to the General Assembly adoption of legislation substantially identical to the Act now being challenged, was ambiguous as to the precise purpose arbitration

[31] For a case chronicling the events supporting the trial judge's conclusion, see St. Paul Fire & Mar. v. Ins. Comm'r, 275 Md. 130, 133, 339 A.2d 291, 293 (1975).

[32] An admitted or authorized insurer "is one duly authorized, by subsisting certificate of authority issued by the [Insurance] Commissioner, to engage in the insurance business in this State." Md. Code (1957, 1972 Repl. Vol.), Art. 48A, § 7. For a description of a surplus line carrier and the extent to which it may operate in this state, see Md. Code (1957, 1972 Repl. Vol. & 1977 Cum. Supp.), Art. 48A, §§ 183-199.

would serve, but apparently the desired objectives there recorded encompassed essentially only the advantage of inducing the complainant to drop his claim in the event of an adverse arbitration award; and (8) the cost of insurance coverage would inevitably be passed on to the consumer of medical services. The trial court, noting that health care was a matter within the public interest and that its cost was subject to regulation under the police power of the legislature, concluded that the announced purpose of the Act — to reduce the cost of medical malpractice claims, thus reducing the cost of liability insurance and stabilizing the market — justified distinguishing the treatment of medical malpractice claims from other tort liability claims. The judge explained that since the evidence established that an arbitration procedure could reasonably be expected to result in the resolution of such claims more rapidly and less expensively than by the usual mode of litigation — the statute being designed to encourage arbitration as the final resolution of the claim — the Act bears a fair and substantial relation to its purpose and is thus not in contravention of the fourteenth amendment or our Declaration of Rights.

The appellees claim, nevertheless, that there was no medical malpractice crisis or medical malpractice insurance crisis other than that created by the doctors themselves, that is, that appellant Medical and Chirurgical Faculty of Maryland, a voluntary professional organization whose membership encompasses ninety-five percent of Maryland's physicians, frustrated new insurance carriers from coming into the market by refusing to endorse them unless they would agree to pay the agent's commission to the Faculty's own insurance agency; they also claim that the 1975 legislation creating Medical Mutual eliminated any need for additional legislation. However, even if it were established that members of the medical profession somehow precipitated the crisis, the fact would not be altered that difficulties existed in the insurance market and that the legislature could attempt to meet that situation by

whatever rational method it deemed most appropriate. Nor is there any basis for the suggestion that the legislature could not properly view its creation of Medical Mutual as merely a temporary solution to the problem. One would, in fact, have to be an ostrich to suggest that no medical malpractice insurance problems existed which the legislature could appropriately attempt to resolve. For a delineation of the nature of the crisis nationwide as well as types of legislation action proposed and taken to deal with it, see Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications,* 55 Tex. L. Rev. 759 (1977); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis,* 1975 Duke L.J. 1417; Comment, *Recent Medical Malpractice Legislation — A First Checkup,* 50 Tulane L. Rev. 655 (1976). We think it clear that this statute, requiring the submission of a malpractice claim to arbitration prior to court suit and thus treating medical malpractice tort claimants differently from other tort claimants, works no violation of the equal protection of the laws.

Initially, we may quickly dispose of the Bar Association's assertion that, since the statute affects the exercise of the right to trial by jury in a civil action, Md. Const., Art. XV, § 6, its differential treatment of malpractice claimants should be subjected to the strict scrutiny which is employed when a classification limits a fundamental right or operates to the disadvantage of a suspect class and hence must be justified by a compelling state interest.[33] The appellee's assertion is premised on the mistaken assumption that the Act interferes with the right to a jury trial. Thus, although we have indeed held that in Maryland the right to a fair and impartial jury in a civil action is a fundamental one, *see Davidson v. Miller,* 276 Md. 54, 68-69, 344 A.2d

[33] For citation of cases in which this standard has been appropriately applied, see Wheeler v. State, 281 Md. 593, 601-02, 380 A.2d 1052, 1057 (1977).

422, 431-32 (1975), in accordance with the principle that a fundamental right is one explicitly or implicitly guaranteed by the Constitution, *see San Antonio School District v. Rodriguez,* 411 U.S. 1, 33-34, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973),[34] we have already established that the statutory classification here in no way deprives, infringes, or interferes with the free exercise of the right to a civil jury trial. For cases indicating that a statutory classification is to be strictly scrutinized when it deprives, infringes, interferes with, or penalizes the free exercise of a constitutional right, see *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 258, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974) (interstate travel); *San antonio School District v. Rodriguez, supra* at 38 (education); *Oregon v. Mitchell,* 400 U.S. 112, 238, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970) (interstate travel) (separate opinion of Brennan, White & Marshall, JJ.).

As the Supreme Court recently observed in this context in *Zablocki v. Redhail,* ___ U.S.___, ___, 98 S. Ct. 673, 682, ___ L. Ed. 2d (1978), it is only when a statutory classification significantly interferes with the exercise mf a fundamental right that it is subjected to rigorous scrutiny. The Court in *Zablocki,* reaffirming the fundamental character of the right to marry, cautioned:

> [W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. [*Id.* at ___[681].]

Since there is here no interference with the exercise of a fundamental right, and since there is no contention, nor

[34] The right to civil trial by jury in state courts is not explicitly guaranteed by the United States Constitution, nor has the seventh amendment right thus far been required of the states as a matter of federal due process through the fourteenth amendment. *See* Bringe v. Collins, 274 Md. 338, 341-45, 335 A.2d 670, 673-75 (1975).

could there be, that a suspect classification is involved, there is no occasion to subject the Act to strict scrutiny.

Failing in their argument that the statutory classification should be strictly scrutinized, the appellees alternatively suggest that an intermediate or means-focused standard of scrutiny should be applied to this legislation; however, our assessment of the validity of the Act will remain the same whether that standard or the traditional rational basis test is applied. Much has been written about the differences between traditional equal protection analysis, which employs the rational basis test for all legislative classifications not strictly scrutinized, and what has been asserted to be a "means-focused" test which would require that legislative means substantially further legislative ends. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 20 (1972). This Court appears not to have differentiated between these two standards to any significant degree, observing that the reasonable basis test requires that a statutory classification bear some rational relationship to a legitimate state purpose *or* rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *See, e.g., Wheeler v. State,* 281 Md. 593, 602-03, 380 A.2d 1052, 1058 (1977), and *Md. St. Bd. of Barber Ex. v. Kuhn,* 270 Md. 496, 507, 312 A.2d 216, 222 (1973), including cases cited in each. Thus we have flatly stated that "[c]ompliance with the Equal Protection Clause requires that legislative classification rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Wheeler v. State, supra* at 603 [1058] (quoting *Prince George's Co. v. McBride,* 268 Md. 522, 531, 302 A.2d 620, 624-25 (1973) (citing cases)). Indeed, Professor Gunther observes that his "means-focused" test "would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must

substantially further legislative ends." Gunther, *supra* at 20.[35]

Applying the traditional rational basis test — the standard employed by a number of our sister states in rejecting challenges to similar legislation, *see Eastin v. Broomfield,* 116 Ariz. 576, 570 P.2d 744, 750-51 (1977); *Prendergast v. Nelson,* 199 Neb. 97, 256 N.W.2d 657, 667-68 (1977); *State ex rel. Strykowski v. Wilkie,* ___ Wis. 2d ___, 261 N.W.2d 434, 441-43 (1978) — it is apparent that the distinction between malpractice claimants and other tort claimants is reasonably related to the legitimate purpose of the Act, namely the protection of the public health and welfare by assuring the availability of malpractice insurance at reasonable

[35] Another commentator differentiates between the two tests by suggesting that under the rational basis test, a court will generally defer to a legislative determination that the means chosen will in fact accomplish its purpose, whereas a court using the means-focused standard will appraise more carefully the factual assumptions underlying the asserted connection between means and ends; he notes that the difference Professor Gunther emphasizes is that while a court using the rational basis test will hypothesize conceivable purposes for the classification, it will not do so when using the means-focused test. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications,* 55 Tex. L. Rev. 759, 772 & n.88 (1977). Without concluding that it would be improper to do so, we have here no need to hypothesize a conceivable purpose for the statute — it takes no imagination to perceive that its purpose is clearly to control the precarious situation obtaining in the medical malpractice insurance market and its effects on the cost of health care. And, even if we carefully appraise the existence of a connection between the legislation and accomplishment of the goal of reduced malpractice insurance rates, as Professor Redish suggests is required when the "means-focused" test is used, *see* Redish, *supra* at 780, it is not necessary to conclude, as he does, that it is therefore inadvisable to use that test due to the impossibility of predicting whether such reform legislation will accomplish its goal. *Id.* at 782. This is so because of the principle that the legislature may not be precluded from attempting to resolve a problem by means whose results cannot be definitively demonstrated in advance. *See* text which follows at page *infra.*

rates.[36] Moreover, even if the reasonable relationship here were not so obvious, "[a] statutory discrimination will not be set aside as [a] denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Davidson v. Miller,* 276 Md. 54, 70, 344 A.2d 422, 432 (1975); *see Governor v. Exxon Corp.,* 279 Md. 410, 439, 370 A.2d 1102, 118 (1977).

Should we, in any event, apply the means-focused standard as creating a more onerous burden than the traditional rational basis test, we would reach no different result. We have no difficulty in concluding that the legislative requirement that malpractice claimants, unlike other tort claimants, first present their contentions to an arbitration panel rests upon a ground of difference bearing a "fair and substantial relation" to the object of the legislation, which seeks to encourage the resolution of such claims without judicial proceedings, thus reducing their cost and consequently the cost of insurance. Obviously there can be no guarantee that the legislation will have the desired effect, thus substantially furthering legislative ends, but we think in a case such as this none is required.

[36] In this connection the Supreme Court of Nebraska in *Prendergast* observed:

> "There are substantial reasons for legislative discrimination in regard to this field. We have seen in recent years the growth of malpractice litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many professional people must either remain unprotected or pass the insurance charges along to their patients and clientele in the form of exorbitant fees and charges. This unduly burdens the public which requires professional services." [256 N.W.2d at 668 (quoting Taylor v. Karrer, 196 Neb. 581, 244 N.W.2d 201, 204 (1976)).]

But see Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399, 410-16 (1976) (applying the "fair and substantial relationship" test to an equal protection challenge to a statute limiting medical malpractice recoveries and remanding for further factual information), *cert. denied,* ___ U.S. ***, 97 S. Ct. 2173 (1977).

This is so because we are of the view that a principle we have applied in rejecting due process challenges to legislation claimed to be arbitrary is applicable here as well: that it is inappropriate for a court to preclude the legislature from attempting to resolve a problem in a particular manner simply because the intended results cannot be definitively demonstrated in advance. "Courts are under a special duty to respect the legislative judgment where the legislature is attempting to solve a serious problem in a manner which has not had an opportunity to prove its worth." *Bowie Inn v. City of Bowie,* 274 Md. 230, 237, 335 A.2d 679, 684 (1975). The "fair and substantial relation" test is met, in a situation where the problem sought to be resolved is unique and the possible techniques for its solution are therefore untested, where the available evidence suggests the soundness of the theory.[37] The burden is upon those who attack the legislation in such a case to show that it will not likely accomplish its goal, *see, e.g., Wheeler v. State, supra* at 603 [1058], and that burden here has not been discharged.

IV.

In concluding this somewhat lengthy opinion, caused in no small degree by the many maladies with which it is claimed this infant statute is afflicted and which have required a complete examination, we reiterate that the statute is free from infirmity on the grounds urged by the appellees, and we therefore reverse the judgment

[37] Otherwise analyzed, this may be a situation in which exercise of "means-focused" scrutiny of equal protection questions is limited, as Professor Gunther suggests, by "particularized considerations of judicial competence." Gunter, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 23 (1972). He specifically suggests that a court cannot "confidently assess whether the means contribute to the end" when the data are exceedingly complex and technical, or when the legislature could reasonably respond to a problem with any one of a wide range of allocation decisions. *Id.* at 24. The same may be true where the problem is new and its solutions untested.

of the Baltimore City Court and direct the issuance of a declaration that the Act is constitutional.

Judgment reversed and case remanded to the Baltimore City Court with directions to enter a judgment declaring that Chapter 235 of the Laws of 1976, codified as Md. Code (1974, 1977 cum. supp.), §§ 3-2A01 to 3-2A09 of the courts article, is constitutional. Costs to be paid by the Appellees.

APPENDIX B

In the Baltimore City Court

111/978/6-099191

James Johnson, et al.,
Plaintiffs,

v.

Francis B. Burch, Attorney General of the State of Maryland, et al.,
Defendants.

OPINION AND ORDER

GREENFELD, J.

Statement of the Case

In this Amended Petition for Declaratory Judgment, the Plaintiffs seek to have declared unconstitutional Sections 3-2A01 through 3-2A09, inclusive, of the Courts and Judicial Proceedings Article of the Maryland Code, also known as the Health Care Malpractice Claims Act or the Medical Malpractice Arbitration Act, and which will be referred to hereafter as "the Act."

The individual Plaintiffs are the parents of Teresa D. Johnson, who died following an automobile accident and two ensuing operations at The Johns Hopkins Hospital. Teresa's father also joins in the suit in his capacity as Personal Representative of her estate. These Plaintiffs allege that Teresa's injuries and death were due to the negligence of the Hospital and its employees, and they desire to sue the Hospital in a court of law without first submitting their claim to arbitration, as required by the Act. Since the amount of the Plaintiffs' potential claim is in excess of $5,000 and

since the incidents complained of occurred after the effective date of the Act (July 1, 1976) it is evident that these Plaintiffs' rights are "affected" by the Act, thus entitling them to seek declaratory relief. See Sec. 3-406 of the Courts Article. The Defendants do not contest the standing of the Plaintiffs in this case. The Court permitted the Bar Association of Montgomery County to intervene as a party Plaintiff; and the Medical and Chirurgical Faculty of the State of Maryland and the Medical Mutual Liability Insurance Society of Maryland, as party Defendants.

The Statute Involved

The Act applies to all claims in excess of $5,000 brought by a person sustaining a medical injury caused by a "health care provider," such as a hospital, physician, nurse, dentist, and the like. Before suit can be filed by the injured party in a court of law, the claim must first be filed with the Health Claims Arbitration Office, a unit of the Executive Department of the State of Maryland, which is headed by a Director appointed by the Governor with the advice and consent of the Senate. An arbitration panel is then selected and shall consist of an attorney (who shall be chairman), a health care provider and a member of the general public who is neither an attorney, a health care provider or an agent or employee of an insurer. The procedure for selecting the arbitrators in a specific case is outlined in the Act and will be discussed in more detail later in this opinion. The arbitration panel shall then conduct a hearing and make a determination as to the liability of the health care provider(s) and, if liability is found to exist, make an award of damages. The award shall include an assessment of costs, including the arbitrators' fees. The procedural aspects of the arbitration hearing is governed by Sections 3-212 through 3-217 and 3-220 of the Courts Article, which comprises part of the Maryland Uniform Arbitration Act. Among other things, Secs. 3-212 and 3-215(a) provide that the decision of a majority of the arbitrators shall prevail. A

party may reject the arbitration award by filing an action in the appropriate circuit court "to nullify the award." This triggers a regular trial either by a judge or jury, in accordance with the Maryland Rules, with the single exception that:

> ". . . the arbitration award is admissible as evidence in the judicial proceeding. The award shall be presumed correct, and the burden is on the party rejecting it to prove that it is not correct."

Prior to the judicial proceeding, the arbitration award may be set aside or modified by a judge for any of the reasons enumerated in the Courts Article, Secs. 3-223(b) or 3-224(b) of the Maryland Uniform Arbitration Act. The attorney's fee in connection with the arbitration must be approved by the arbitration panel; and the attorney's fee for the judicial proceeding must be approved by the court. The Act declares that it is "procedural in nature" and shall not be construed to "create, enlarge or diminish any cause of action not heretofore existing" except the defense of failure to comply with its procedures.

Findings of Fact

As of the time of trial, April, 1977, the Director of the Health Claims Arbitration Office had not yet been appointed by the Governor. Since the effective date of the Act, July 1, 1976, the functions of the Arbitration Office have been implemented by several members of the Governor's staff. No funds have been appropriated for the Arbitration Office for the current fiscal year, but an appropriation exists for the fiscal year beginning July 1, 1977 of $42,508.

Only one claim has been received by the Arbitration Office since 7/1/76, although there have been about 25 inquiries regarding the filing of claims. A panel has not yet been named to hear this claim. No concrete evidence was presented to explain the dearth of claims, but it is reasonable to assume that one of the causes is not necessarily the lack of medical malpractice claims, but rather the aversion to the Act shared by many

claimants' attorneys, who are awaiting a judicial determination as to whether the Act is valid. Moreover, the Act applies only to medical injuries occurring on or after 7/1/76.

The Governor's staff has compiled a list of potential arbitrators, consisting of 770 attorneys, 756 health care providers and 1225 members of the general public. A letter was sent to every attorney in the State who is a member of the Client Security Fund inquiring of his or her willingness to serve as an arbitrator. A similar letter was sent to all known health care providers in the State. Members of the general public were solicited by a press release given to the news media throughout the State. Every person who responded and filled out an information sheet was automatically placed on the available list of arbitrators in the appropriate category. No inquiry was made of any attorney as to the amount of his trial experience or familiarity with medical malpractice claims.

Regulations of the Medical Malpractice Arbitration Office were adopted on 12/13/76 (Pl. Ex. No. 7). Although not yet provided for in the Regulations, a "tentative policy decision" has been made that no costs or fees attendant to the arbitration need be paid until after the case has been judicially determined. However, the Regulations do provide that the cost of the arbitration transcript is to be paid by the party requesting it. See Regulation 01.03.11 H. (1).

The cost of bringing a medical malpractice case to trial on behalf of a claimant is expensive, primarily because of the necessity to produce expert testimony. A treating physician will usually charge about $50 per report plus $300 to $1,000 per day of trial testimony. A non-treating physician's charges range from $500 to $1,000 to review the records and give the claimant's attorney a pre-trial opinion, plus $750 to $1,000 per day for trial testimony. The testimony of at least two medical experts is usually required to support a claimant's case. An expert economist, where required,

will charge about $500 for a report plus $750 to $1,000 per day of trial testimony. The average expense of preparing and presenting a claimant's case in court ranges from $3,000 to $7,500, which includes the cost of experts, depositions, etc., but does not include attorneys' fees.

If a claimant's case must be first presented to an arbitration panel before entering the judicial forum, as required by the Act, he will be subjected to the additional expense of the cost of expert testimony before the panel (at least $2,000) plus the arbitrators' fees if assessed against him, which, at the rates established by the Regulations of $140 per day, would total $1,400 for a 10-day hearing. If the claimant desires a transcript of the arbitration proceeding, this will cost approximately $300 per day; however, the incurrence of such an expense is not mandated.*

The arbitration procedure mandated by the Act will substantially increase the claimant's cost of arbitration if either party desires to have the case tried thereafter in court. On the other hand, the arbitration procedure will reduce the claimant's cost of litigation if all parties accept the arbitration award. But even under the latter possibility, not all of the court-related expenses would be eliminated, such as depositions and pre-hearing consultations with, and reports from, the experts.

It should also be noted that the high cost of litigating a medical malpractice claim in court virtually precludes the institution of a suit having a potential recovery of less than $15,000. However, the availability of the arbitration procedure would permit claims of this moderate nature to be pursued by way of submitting written reports of experts to the panel, thus reducing the claimant's expenses significantly. It is unlikely,

* If the claimant needs to procure a transcript in order to subsequently attack the arbitration award in court because of a ground stated in Sections 3-223(b) or 3-224(b)(1)-(4) of the Maryland Uniform Arbitration Act, presumably the costs of the transcript would be assessed.

however, that a claimant would use this expedient where the claim is of a greater magnitude.

The usual practice in the State is for claimant's attorneys to charge a contingency fee equal to one-third of the damages recovered, but the attorney is not recompensed at all if the health care provider wins the case. Because the contingency arrangement usually results in greater remuneration to an attorney in a winning case as compared to the fee he would have received on an hourly basis, the attorney is willing to risk nonpayment if he loses the case. As a result, the contingent fee arrangement permits claimants to obtain legal representation in many instances when they are unable (or unwilling) to pay an attorney's fee on an hourly basis regardless of the result. If the arbitrators or the courts will not approve contingent fee arrangements, fewer malpractice claims will be undertaken by attorneys.

A pilot project was undertaken in Southern California for the years 1970-1975 whereby 8 hospitals offered to their patients an arbitration procedure, on a voluntary basis, as their exclusive remedy for malpractice claims against the hospitals. The results of this program were compared to the malpractice claims experience of 8 other hospitals during the same period where the exclusive remedy by claimants was the traditionally recourse to the Courts. The 8 hospitals in this "Comparative Group" were substantially identical to the 8 hospitals in the "Arbitration Group" as regards the number of admissions, plant size, geographic location, economic class of patients, etc. The study showed that the Arbitration Hospitals resolved more claims, more rapidly and at less cost than the Comparative Group. Specifically, the indemnity payments averaged 15% less per claim, and the cost of defense and investigation was an average of 18% less per claim for the Arbitration Hospitals than the Comparative Group. The dissimilarities between this study and the procedures involved with the Maryland statute are at once evident: (i) arbitration was the exclusive and final remedy in the

Arbitration Hospitals, whereas arbitration is only the first step in Maryland; (ii) the arbitration was voluntary in the pilot program, whereas it is made mandatory by the Act; and (iii) the pilot program only involved suits against hospitals, whereas the Act involves claims against all health care providers.

The events leading up to the passage of the Act were dealt with at some length during the trial. Related facts are outlined in *St. Paul Fire & Mar. v. Ins. Comm'r*, 275 Md. 130 (1975). By 1974, St. Paul Fire & Marine Insurance Company ("St. Paul") was the medical malpractice insurer for approximately 85% of the physicians practicing in Maryland. On 1/4/74, St. Paul was granted a 45.9% rate increase by the State Insurance Commissioner ("the Commissioner"). In may, 1974 St. Paul's request for an additional 48% increase was rejected by the Commissioner, whereupon St. Paul advised the Medical and Chirurgical Faculty of Maryland ("Med Chi") that it would cease writing liability coverage for physicians and surgeons as of 1/1/75. Med Chi is a voluntary professional organization whose membership comprises 95% of Maryland physicians. Faced with this situation, Med Chi retained Johnson & Higgins, a national insurance broker, in September, 1974 to try to procure a replacement insurer. The Johnson & Higgins effort was unsuccessful, and in January, 1975 Med Chi began pursuing the concept of the creation of a new insurance company to provide medical malpractice coverage, which would be initially funded by a tax upon all Maryland physicians. This led to the creation of the Medical Mutual Liability Insurance Society of Maryland ("Med Mutual") as authorized by Article 48A, Sec. 548, *et seq.* of the Maryland Code, effective June 1, 1975. Meanwhile, St. Paul had been prevailed upon to retain its coverage until the date Med Mutual became operative. As a result, Maryland physicians were not at any time left without available insurance protection.

At the present time, approximately 90% of Maryland physicians utilize Med Mutual. The remaining 10% are

insured through policies carried by the hospitals where they are employed, or by Mutual Fire Marine & Inland Insurance Co. ("Mutual Fire"). Mutual Fire offered medical malpractice insurance in Maryland since September, 1974. Unlike St. Paul and Med Mutual, which are "admitted" carriers, Mutual Fire is a "surplus line" carrier and, as such, is not subject to many statutory and regulatory provisions. See Article 48A, Sec. 183, *et seq.* Among other things, a surplus line carrier may cancel a policy without a hearing before the Commissioner, and its rates are not subject to the Commissioner's approval.

Mutual Fire's rates are lower than those of Med Mutual, but the former offers "claims-made" coverage; the latter, "occurrence" coverage. Even though Mutual Fire offers additional types of coverage (at additional cost) which it asserts to be the equivalent of "occurrence" coverage, the disparities are such that a physician could reasonably conclude that Med Mutual's "occurrence" coverage is more protective and that a surplus line carrier is a less desirable insurer.

One other surplus line carrier, Glacier General Insurance Company, has just entered Maryland and has written one medical malpractice policy on an "occurrence" basis.

The Plaintiffs sought to prove that Med Chi's actions in latter 1974 stifled the procuring of an "admitted" insurer as a replacement for St. Paul. However, the Court finds as a fact that Med Chi's actions were not unreasonable; that the medical malpractice insurance market, prior to the creation of Med Mutual, was very "tight"; and that, even though Med Mutual has made liability insurance available to Maryland physicians, the absence of any other "admitted" carrier in the State signifies the continued precariousness of this particular type of insurance market.

On 7/23/75, the President of the State Senate and the Speaker of the House appointed a Medical Malpractice Insurance Study Committee ("the Committee"), com-

posed of legislators and legal, medical, hospital and insurance authorities. The Committee conducted hearings and submitted a report to the Legislature dated 1/6/76 (Def. Ex. No. 3). This report states that the Committee:

> ". . . was charged with the task of seeking a permanent solution to the myriad problems of medical malpractice insurance facing the physicians and patients of the State of Maryland. Although the General Assembly took decisive action in the 1975 Session to provide for the availability of insurance through Senate Bill 816, Chapter 544 of the Laws of Maryland, 1975, creating the 'Medical Mutual Liability Insurance Society of Maryland,' it was recognized that such action represented only temporary relief and the need for a longer, more permanent solution was apparent." (p.1 of Def. Ex. No. 3.)

The Committee recommended the adoption of legislation which is substantially identical to the Act that was thereafter adopted by the General Assembly. The Committee noted that nearly all of the testimony presented to it included recommendations "for some type of mechanism to screen malpractice claims prior to the filing of suit," and that mandatory arbitration has been tried "with apparent success" in two Pennsylvania counties. In what was perhaps the only indisputable statement in its report, the Committee observed that:

> "The issues surrounding the medical malpractice problem are extremely complex and sometimes highly emotional." (p. 23 of Def. Ex. No. 3)

The Committee concluded with the "belief" that its recommendations "may well be the first step in arriving at a satisfactory solution to the problem."

The report is ambiguous as to the precise purpose that arbitration would serve. For example, there are enumerated and discussed three "asserted advantages" of pretrial screening by a medical review panel (pp. 4-7 of Def. Ex. No. 3):

1. It would provide a device for obtaining expert opinion on the question of negligence. However, the Committee expressed some concern as to whether health care providers would render "impartial" opinions.

2. By screening claims, it would induce insurers to settle if the health care provider were found to be negligent, and it would inhibit a claimant from pursuing court action if the health care provider were found not to be negligent. The Committee recognized, however, that insurers are not now reluctant to settle cases in which liability is probable and concluded that a medical review panel would not encourage additional settlements.

3. It would serve as a record keeping agency on the incident and type of malpractice claims.

The report then states (p. 8 of Def. Ex. No. 3):

"For these reasons, and because the *other benefits* attributable to medical review panels can also be achieved through mandatory arbitration, the mechanism of medical review panels does not appear to be warranted.

"Mandatory arbitration, however, if properly constructed, can achieve *the desired objectives.*" (Emphasis supplied.)

Since a mandatory arbitration panel would, like a medical review panel, be composed of physicians, lawyers and laymen, the impartiality criticism directed by the Committee against the latter would also be applicable to the former. Moreover, the arbitration panel would not be expected to induce insurer settlement any more than a medical review panel. Consequently, it would appear that the "other benefits" and the "desired objectives" alluded to by the Committee encompasses only the advantage of inducing a claimant to drop the claim if the arbitration award is adverse. (The other remaining advantage, a record-keeping agency on the incidence of malpractice claims, would seem to be of minimal importance, and that end

could easily be accomplished by less elaborate machinery.)

Finally, it should be noted that in 1974, 109 medical malpractice suits were filed in Maryland (p. 6 of Def. Ex. No. 3). In 1975, the number increased to 136 in the State except in Anne Arundel, Prince George's, Washington and Wicomico Counties, where data was not available; and in 1976, the number of suits filed was 141, excluding the same counties as in the 1975 compilation (Pl. Ex. No. 11).

Also introduced into evidence was statistical data on medical malpractice claims throughout the country (Pl. Ex. No. 2) and the Report of the Secretary's Commission on Medical Malpractice of the Department of Health, Education and Welfare (Pl. Ex. No. 1).

Plaintiffs' attack on the constitutionality of the Act rests on several grounds, which will be discussed *seriatum.* The issues have been fully briefed and argued, and all counsel are to be commended for their highly professional presentations.

At the outset, it should be observed that the issues here involved are not susceptible to quick and easy resolution, as evidenced by the fact that in litigation involving somewhat similar, but not identical, statutes in five other states, two have been upheld, *Comiskey v. Arlen,* 390 N.Y.S.2d 122 (N.Y. App., 1976), *Carter v. Sparkman,* 335 So. 2d 802 (Fla., 1976); two have been invalidated, *Wright v. Central Du Page Hospital Association,* 347 N.E.2d 736 (Ill., 1976), *Simon v. St. Elizabeth Medical Center,* 355 N.E.2d 903 (Ct. Comm. Pl., Ohio, 1976); and one remanded for further evidence, *Jones v. State Board of Medicine,* 555 P.2d 399 (Idaho, 1976).

Delegation of Judicial Power

Plaintiffs contend that the arbitration panel performs judicial functions in direct contravention of Section 1 of Article IV of the Maryland Constitution and Article 8 of the Maryland Declaration of Rights. The State constitu-

tional provision vests the "Judicial power of this State" in certain enumerated courts. The Declaration of Rights provision establishes the doctrine of separation of powers and prohibits any one of the three departments of government, the Legislative, Executive and Judicial, from assuming or discharging the duties of the other. On the other hand, Defendants maintain that the function of the arbitration panels is merely an exercise of the quasi-judicial power by an administrative agency in the furtherance of a proper legislative purpose under the police power of the State.

The applicable principles have been the subject of two recent opinions by the Court of Appeals of Maryland: *County Council v. Investors Funding,* 270 Md. 403 (1973) and *Dep't. of Nat. Res. v. Linchester,* 274 Md. 211 (1975). While it is not unusual, nor *per se* unconstitutional, for administrative agencies to perform certain judicial functions, such as fact-finding, this encroachment on the judicial process "has been largely justified by reservation of ultimate authority in the courts"; and "the determining factor is not so much the specific powers granted to the administrative agency, but rather the relationship of the courts' to the exercise of that power." *County Council, supra,* 270 Md. at 432, 436. However, in such situations, the power of the courts is normally limited to enforcement of the agency's orders and a review of whether the agency's decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner; but the court may not substitute its judgment for that of the agency, nor may the court make independent findings of facts that were considered by the agency. *Linchester, supra,* 274 Md. at 223-226. Moreover, and perhaps more importantly, it has been held that:

> " '(T)he pivotal point in determining the permissible extent of delegable adjudicatory functions is not merely their inherent nature but the context of the *regulatory scheme* and the enforcement procedure provided by the administrative process.' We think it plain that the function of the (administrative agency) is *primarily administrative* and the power vested in it to hear and determine controversies . . . is granted *only as an incident to its administrative duty;* in other words, the (agency's) function is *not* primarily to decide questions of legal rights between private parties, but is *merely incidental,* although reasonably necessary, to its *regulatory powers.*" (Emphasis supplied.) *County Council, supra,* 270 Md. at 441.

This "dual role," of performing quasi-legislative and quasi-judicial duties, is constitutionally permissible. *Linchester, supra,* 274 Md. at 222.

Applying these principles to the case at bar, it becomes apparent that an arbitration panel constituted under the Act performs *only* judicial functions. It does not exist for any "regulatory" or "administrative" purpose. It does not regulate or administer or police the health care industry. It is not supervisory in any sense of the word. Its function is solely to make findings of liability and to award damages in medical malpractice cases. This is precisely what the judiciary does in such situations. This judicial function of the arbitration panel is not "merely incidental" to its "regulatory powers" for the basic reason that the panel has no regulatory powers. The function of the panel is exclusively judicial and therefore unconstitutional.

Defendants point to the fact that the panel's decision cannot be enforced without court order. While that is one factor to be considered, it may be determinative only if coupled with a limited scope of judicial review. But here, the entire case that is heard by the arbitration panel is subject to a completely fresh, *de novo,* trial in a court of law.

Nevertheless, Defendants point to the procedures existent in workmen's compensation cases as a direct analogy to the procedures established by the Act. There are, indeed, many similarities, some of which are not only indistinguishable from the Act but which also fly in the face of the governing principles enunciated in the

cases cited in this opinion. *Linchester* recognized this difficulty and said this (247 Md. at 226-227):

> "However, it is recognized that in *very rare instances* there can be created administrative agencies whose functions are subject, as authorized by the Legislature, to a broader scope of judicial review. This type of agency is a hybrid in that its basic function is so essentially judicial that it can be considered to be supplanting what might have been a court function, albeit in a constitutional sense its activity is legislative in nature because it is 'part of the *police power,* as contradistinguished from the regular judiciary powers of the State.'
>
> * * * * * *
>
> Indeed, the Workmen's Compensation is a perfect, and may be at present the *singular,* example of Judge Markell's 'particular classes of cases.' It falls into this category, at least in part, because its activities are in *substitution for traditional common law rights and procedures* while at the same time it functions to establish a *remedy otherwise the subject of a tort action* . . . As a result, this agency's activities have been subject to a considerably more expansive type of judicial review which has been unchallenged for more than half a century." (Emphasis supplied.)

The Court also referred to workmen's compensation as a "twilight situation." *Id.* at 227.

The dissimilarities between the workmen's compensation law and the Act are substantial. The workmen's compensation law abrogated the common law concept of fault for employees' injuries but on the other hand, limited the amount of recovery to a statutory schedule. No such *quid pro quo* is found in the Act, and this factor is not without significance. Indeed, this "substitution for common law rights" was articulated as the rationale in *Linchester* to justify placing workmen's compensation procedures in a separate category altogether. Moreover, an earlier appellate decision emphasized as distinctive two features of the workmen's

compensation law: the granting of an exclusive remedy at variance with the common law, and the removal from discretionary determination of the amount of damages. See *Branch v. Indemnity Ins. Co.,* 156 Md. 482, 486, 488 (1929). In contrast, the Act retains, without change, the traditional common law remedy of medical malpractice claimants, including liability through fault and the discretionary award of damages.

It should be noted that the *Linchester* case refused to extend the workmen's compensation analogy to an administrative agency even though that agency, like the workmen's compensation law, was "part of the police power" of the State. While conceding that some pronouncements in the workmen's compensation decisions are impossible to reconcile with general principles of administrative law, it is clear that these pronouncements are to be strictly limited to the context of the workmen's compensation law. The teaching of *Linchester* and prior decisions of the Court of Appeals is that it is too simplistic, indeed inaccurate, to automatically apply workmen's compensation doctrine to other areas of the law.

For the reasons stated, the Court finds that the Act unconstitutionally delegates judicial power to an administrative agency.

Equal Protection

Plaintiffs also contend that the Act violates the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution and the due process clause of Article 23 of the Maryland Declaration of Rights because it treats medical malpractice tort claims differently than other tort claims. In reveiwing the constitutionality of statutory classifications, the traditional "rational basis" test enunciated in *McGowan v. Maryland,* 366 U.S. 420, 425-426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it") has been somewhat modified by the "means-focus" test exemplified by *Reed v. Reed,* 404 U.S. 71, 76 (1971):

> ". . . A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relation to the object of the legislation* . . .'" (Emphasis supplied.)

For a more detailed discussion of the emergence of these principles, see *Wheeler v. State,* ___ Md. App. ___, No. 725, Sept. Term, 1976, May 2, 1977 *Daily Record;* and *Jones v. State Board of Medicine, supra,* 555 P.2d, 399 (Idaho, 1976).

The facts adduced at the trial abundantly demonstrated that there existed a severe medical malpractice insurance crisis in the State in 1974 when St. Paul, the dominant insurer, first received a dramatic rate increase but shortly thereafter announced its intention to cease writing such insurance when another, equally dramatic, rate increase was subsequently refused by the Insurance Commissioner. The eventual creation of Med Mutual in June, 1975 alleviated the situation to some extent, for it made malpractice insurance available to health care providers, but the instability of the insurance market continued to exist and, as stated by the legislative Committee, Med Mutual "represented only temporary relief and the need for a longer, more permanent solution was apparent." Evidence is hardly necessary to establish the obvious facts that health care providers are anxious to procure malpractice insurance protection, and that the cost of such coverage, like any other business expense, will inevitably be passed onto the consumer in the form of higher fees and charges.

No one disputes the proposition that health care is a matter within the public interest, and that the Legislature may attempt to control health care costs. *Cf., Blue Cross v. Franklin Sq. Hosp.,* 277 Md. 93 (1976), upholding the power of the Health Services Cost Review Commission to regulate hospital rates. The announced purpose of the Act, as stated by the Committee throughout its report, was to help reduce the cost of medical malpractice claims, which, in turn, would reduce the cost of liability insurance and hopefully

stabilize this particular insurance market. This alone justifies the Legislature's separate treatment of medical malpractice claims from other tort liability claims, and the only remaining issue on this point is whether the Act itself has a "fair and substantial relation to the object of the legislation."

Plaintiffs contend that the arbitration procedure mandated by the Act will add another expensive step in the resolution of these tort claims, for it requires a claimant to try his case not only in court but also before the panel; consequently, the Act will add to the cost of malpractice claims, rather than reduce it, and will, therefore, achieve exactly the opposite purpose than that which the Legislature intended.

It must be conceded that if a claimant or a health care provider decides not to accept the decision of the arbitration panel, then the costs of resolving the claim would be greater than if arbitration had not been required. However, other and more probable results can be expected to occur. Court action to nullify the arbitration award may not be the automatic response of a losing party. Is it not just as reasonable, if not more reasonable, to assume that a losing party, because of the additional time and expense, and because of the presumption of correctness of the arbitration award, will be discouraged from pursuing a judicial trial? The Act is designed to encourage arbitration as the *final* resolution of this type of claim, even though the option exists of going forward in court. The evidence establishes that an arbitration procedure will, or at the very least, can be reasonably expected to, result in the resolution of medical malpractice claims more rapidly and at less cost than by traditional resort to the courts. If claims are resolved at less cost by means of arbitration, the purposes of the Act will have been achieved. Naturally, the result anticipated by the Legislature is not guaranteed, but that is no impediment to the validity of the Act. There is a reasonable premise for the legislative scheme, and

> "Courts are under a special duty to respect the legislative judgment where the legislature is attempting to solve a serious problem in a manner which has not had an opportunity to prove its worth." *Bowie Inn v. City of Bowie,* 274 Md. 230, 237 (1975).

Therefore, the Act has a fair and substantial relation to its purpose and, accordingly, does not violate the Equal Protection requirements of the Federal Constitution or the corollary due process requirements of the Maryland Declaration of Rights.

Denial of Trial By Jury

Plaintiffs contend that the Act interferes with a claimant's right to jury trial guaranteed by Articles 5 and 19 of the Maryland Declaration of Rights and Article XV, Section 6 of the Maryland Constitution. In support of this contention, Plaintiffs allude to the following encroachments on traditional jury trial procedures: (a) assessment of costs, including arbitrators' fees against the claimant; (b) the additional cost of producing expert witnesses at the arbitration proceeding; (c) the time consumed by the arbitration and the resulting delay in commencing with the judicial proceeding; (d) the possible delay occasioned by seeking to have the arbitration award modified or vacated by a court prior to the judicial trial on the merits; and (c) the presumption of correctness which attaches to the arbitration award in the judicial proceeding.

As to the assessment of arbitrators' fees, Plaintiffs assume that these fees, if assessed against the claimant, will have to be paid by him as a precondition to pursuing the judicial remedy. However, the payment of costs as a requisite to judicial relief has been upheld on many occasions, *Knee v. City Pass. Ry. Co.,* 87 Md. 623 (1898); *Application of Smith,* 112 A.2d 625 (Pa., 1955); *United States v. Kras,* 409 U.S. 434 (1973) and *Ortwein v. Schwab,* 410 U.S. 656 (1973), both distinguishing *Boddie v. Connecticut,* 401 U.S. 371 (1971). In any event, nothing in the Act or the Regulations requires the payment of these costs prior to the judicial proceeding.

As to the presumption of correctness attaching to the arbitration award, it is not dissimilar to the issue confronting the Supreme Court of the United States in *Meeker & Co. v. Lehigh Valley R.R.,* 236 U.S. 412 (1915), where it was held that the findings of fact of a federal administrative commission, even though prima facie evidence of such facts in a de novo trial, did not infringe upon the Seventh Amendment right to trial by jury. The Supreme Court said this (*Id.* at 430):

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law . . ."

See also *Ex Parte Peterson,* 253 U.S. 300, 310-311 (1920). Even though the Seventh Amendment to the Federal Constitution is not applicable to state court proceedings, *Bringe v. Collins,* 274 Md. 338, 341 (1975), this reasoning is still persuasive.

Plaintiffs make the "limited concession" that each of these encroachments may not separately violate constitutional principles; however, it is argued that *collectively* they represent an unconstitutional deprivation of the right to trial by jury. Plaintiffs also concede, as they must, that the right to trial by jury is subject to "reasonable regulation." *Houston v. Lloyd's,* 241 Md. 10, 14 (1965).

As previously noted, the rationale for the Act's classification is that it will encourage resolution of medical tort claims at the arbitration level. Indeed, if the Act were not designed for this purpose, then the Act would merely add another step in the claims procedure without attendant benefits. The arbitration procedure requires a claimant (and a health care provider) to incur substantial expenses ($2,000 as a likely minimum) in producing expert witnesses before the arbitrators. Moreover, the arbitration procedure substantially delays the time to reach trial, for not only must the

arbitration first be completed, but further hearings are likely to occur to attempt to modify or vacate the award. Admittedly, the time from filing the arbitration request to completion of the arbitration does not constitute a total net delay, for some of procedures requisite to trial will have been utilized prior to arbitration, such as discovery, consultation with witnesses, and the like. Nevertheless, it is evident that the intervention of the arbitration procedure will result in a significant lengthening of the time necessary to achieve a final judicial resolution of the claim. Finally, a claimant who is faced with an adverse arbitration decision, will, at the very least, be discouraged from pursuing the judicial remedy, where he must not only satisfy the ordinary burden of proof but must also overcome the presumption of correctness of the arbitrators' decision.

One of the avowed purposes of the Act, as stated by the legislative committee, is to inhibit a claimant from pursuing court action if the health care provider were found not negligent by the arbitration panel. It is apparent that the arbitration procedure imposes procedural and monetary impediments that are calculated to achieve this very result. It is the opinion of the Court that these impediments are so substantial as to deny a claimant reasonable access to the courts and his attendant constitutional right to trial by jury.

Attorney's Fees

Plaintiffs contend that the Act unduly interferes with the right of a claimant to contract with his attorney. However, the Act merely prohibits an attorney from charging or collecting compensation without prior approval of the arbitration panel and the court. Nothing in the Act prohibits an attorney from contracting with the client on a contingent fee or hourly basis. The Act is merely designed to prevent the collection of unreasonable or excessive fees by both claimants' and defendants' attorneys. The regulation of attorneys' fees has consistently been upheld. See, for example, *American Trial Lawyers Ass'n v. New Jersey S. Ct.*, 316 A.2d

19, aff'd 330 A.2d 350 (N.J. 1974); *Gair v. Peck*, 160 N.E.2d 43 (N.Y., 1959), *cert. den.*, 361 U.S. 374 (1960); and *Schlesinger v. Teitelbaum*, 475 F.2d 137 (3d Cir.) (1973), *cert. den.*, 414 U.S. 1111 (1973).

The testimony and the report of the Committee fully justify the charging of contingency fees, and it cannot be assumed that such fees would not be approved by the arbitration panel or the court.

Bias of the Arbitrator

Pervading all of Plaintiffs' contentions is the potential bias of the arbitrator who is a health care provider. The asserted justification for including a health care provider on the arbitration panel is that he would be a mechanism for obtaining expert opinion. However, the legislative Committee expressed some concern whether this would be an "impartial" opinion. Some physicians who appeared before the Committee indicated that they would not follow the common law standard of negligence in cases of medical malpractice but would, instead, apply a less strict standard. (p. 5, Def. Ex. No. 3)

Recognizing this difficulty, the Act attempts several safeguards. First, by incorporating Secs. 3-212 and 3-215(a) of the Courts Article into the Act, the decision of a majority of the arbitrators is to prevail. Thus, the health care provider cannot dominate the panel. Second, Sec. 3-2A04(b) of the Act provides that the Director shall select 5 names of prospective arbitrators at random from each category and then:

> ". . . the Director shall inquire of the persons selected and assure himself that they do not have a personal or economic relationship with any of the parties that can form the basis of any partiality on their part."

After this selection process, each party may object for cause to any person on the list and may also strike two of the five names in each category without cause. The Director shall then select the arbitrators who are mutually agreeable to the parties. See Sec. 3-2A04(b)

and (c). Finally, by incorporating Sec. 3-224(b)(1)-(4) of the Courts Article into the Act, an arbitration award can be judicially vacated if the award was procured by "corruption, fraud, or other undue means," or if there was "evident partiality by an arbitrator appointed as a neutral."*

**Query:* Is the health care provider a "neutral" arbitrator?

In oral argument, Plaintiffs suggested that it would be virtually impossible for a physician member of the panel to be unbiased, because a large damage award would directly and adversely affect the malpractice insurance rates of that very arbitrator. This danger is particularly existent in Maryland, where over 90% of its practicing physicians are covered by one insurer, Med Mutual. Even if this particular arbitrator were one of the small group of physicians insured by Mutual Fire, and the defendant by Med Mutual, it is possible that Mutual Fire's rates would be affected, at least in part, by the general incidence of substantial medical malpractice awards.

It is not necessary to decide whether this built-in conflict is crucial to the Act, in light of the decision today that the Act is otherwise unconstitutional. Suffice it to say, the Legislature was fully aware of this problem and attempted to provide some protection against it.

CONCLUSION

Sections 3-2A01 through 3-2A09, inclusive, of the Courts and Judicial Proceedings Article of the Maryland Code, are hereby declared to be unconstitutional, and the Plaintiffs James Johnson and Sheila Johnson are hereby permitted to file suit directly in the Baltimore City Court on account of the death of their daughter having allegedly occurred as a result of medical injury. It is so ORDERED, this 6th day of June, 1977.

MARTIN B. GREENFELD,
Judge.

APPENDIX C

In the Court of Appeals of Maryland

No. 108

September Term, 1977

Attorney General of the State of Maryland, et al.,
Appellants,
v.
James Johnson, et al.,
Appellees and Cross-Appellants.

MOTION FOR RECONSIDERATION AND STAY OF MANDATE

COME NOW the Appellees, James and Sheila Johnson, by their attorneys, Marvin Ellin and Jonathan Schochor, and represent unto this Honorable Court as follows:

1. That this Court, on April 5, 1978, rendered a 51 page decision in which some of the points raised by the respective briefs were ruled upon.

2. That said decision, it is respectfully urged, failed to consider the practical effect upon indigent plaintiffs of the Health Care Malpractice Claims Statute, [Md. Code (1974, 1977 Cum. Supp.), §§ 3-2A01 to 3-2A09 of the Courts Article], which makes mandatory the payment of arbitrators' fees, the purchase of a transcript of the arbitration proceedings, and other similar costs, as a condition precedent to gaining access to the Courts.

3. That this Honorable Court failed to consider the denial to an injured patient of the right to examine an arbitrator under oath (*voir dire*) so as to discover those facts necessary to a determination of the arbitrator's partiality.

4. That this Honorable Court failed to consider the Act's lack of standards for adjudication, which will result in arbitrary and capricious decisions on the part of the arbitrators. This Court's failure to apply administrative law principles to the arbitration panel leaves unresolved the issue of what law governs the action of the arbitrators.

WHEREFORE, the Appellees pray that this Honorable Court:

a) Grant a reconsideration of the issues in this case, and

b) Order a stay of the mandate of this Honorable Court pending such reconsideration.

Respectfully submitted,

MARVIN ELLIN,
JONATHAN SCHOCHOR.

APPENDIX D

In the Court of Appeals of Maryland

No. 108

September Term, 1977

Attorney General of Maryland, et al.,
Appellants,

v.

James Johnson, et al.,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that JAMES JOHNSON, Personal Representative of the Estate of the Late TERESA D. JOHNSON, and JAMES JOHNSON, Individually, and JAMES JOHNSON and SHEILA D. JOHNSON, Surviving Parents of the late TERESA D. JOHNSON, Appellees in the above-captioned action, hereby appeal to the Supreme Court of the United States from the final judgment of this Court, reversing the judgment of the Baltimore City Court and upholding the constitutionality of Md. Cts. & Jud. Proc. Code Ann. §§ 3-2A01 to 3-2A09 (Cum. Supp. 1977). The judgment of the Court of Appeals of Maryland was entered on April 5, 1978, and Appellees' Motion for Reconsideration was denied on April 21, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

MARVIN ELLIN,
JONJTHAN SCHOCHOR,
Attorneys for Appellees.

APPENDIX E

Maryland Courts & Judicial Proceedings

Subtitle 2A. Health Care Malpractice Claims.

§ 3-2A01. Definitions.

(a) *In general.* — In this subtitle, the following terms have the meanings indicated unless the context of their use requires otherwise.

(b) *Arbitration panel.* — "Arbitration panel" means the arbitrators selected to determine a health care malpractice claim in accordance with this subtitle.

(c) *Court.* — "Court" means a circuit court of a county or court of the Supreme Bench of Baltimore City having jurisdiction over actions at law.

(d) *Director.* — "Director" means the Director of the Health Claims Arbitration Office.

(e) *Health care provider.* — "Health care provider" means a hospital, a related institution as defined in Article 43, § 556 of the Code, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a dentist, a podiatrist, and a physical therapist, licensed or authorized to provide one or more health care services in Maryland. "Health care provider" does not mean any nursing institution conducted by and for those who rely upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination.

(f) *Medical injury.* — "Medical injury" means injury arising or resulting from the rendering or failure to render health care. (1976, ch. 235, § 1.)

§ 3-2A02. Exclusiveness of procedures.

(a) *Claims and actions to which subtitle applicable.* — All claims, suits, and actions, including cross claims,

third-party claims, and actions under Title 3 Subtitle 9 of this article, by a person against a health care provider for medical injury allegedly suffered by the person in which damages of more than $5,000 are sought are subject to and shall be governed by the provisions of this subtitle. An action or suit of that type may not be brought or pursued in any court of this State except in accordance with this subtitle. An action in which damages of $5,000 or less are sought is not subject to the provisions of this subtitle.

(b) *Statement of amount of damages.* — A claim filed under this subtitle and an initial pleading filed in any subsequent action may not contain a statement of the amount of damages sought other than that they are less than or more than a required jurisdictional amount. (1976, ch. 235, § 1.)

§ 3-2A03. Health Claims Arbitration Office.

(a) *Created; appointment of Director.* — The Health Claims Arbitration Office is created as a unit in the Executive Department. It is headed by a director appointed by the governor with the advice and consent of the Senate.

(b) *Compensation of Director; staff.* — The Director shall receive the salary and may employ the staff provided in the State budget. He shall perform the duties set forth in this subtitle.

(c) *List of qualified persons willing to serve as arbitrators.* — The Director shall prepare a list of qualified persons willing to serve as arbitrators of health care malpractice claims. He shall include among others on the list persons on the American Arbitration Association list or arbitrators who are willing to serve. The list shall be divided into three categories, one containing the names of attorneys, one containing the names of individuals who are health care providers, and one containing the names of persons from the general public who are neither attorneys, health care providers, or agents or employees of an insurance company or society. The list of health care providers

shall, if practicable, include at least one health care provider from each recognized specialty, with the specialty being designated with the name.

(d) *Arbitrators' fees.* — The Director shall by regulation determine the fees that may be charged by arbitrators for services rendered by them in proceedings conducted pursuant to this subtitle. (1976, ch. 235, § 1.)

§ 3-2A04. Filing of claim; appointment of arbitrators.

(a) *Filing of claim and response.* — A person having a claim against a health care provider for damage due to a medical injury shall file his claim with the Director. The Director shall cause a copy of the claim to be served upon the health care provider by the appropriate sheriff in accordance with the Maryland Rules. The health care provider shall file a response with the Director and serve a copy on the claimant within the time provided in the Maryland Rules for filing a responsive pleading to a declaration. The claim and the response may include a statement that the matter in controversy falls within one or more particular recognized specialties. A third-party claim shall be filed with the response of the third-party claimant to the original claim.

(b) *Lists of names to be given parties; copy of § 3-2A06.* — Within ten days after the time for filing a response, the Director shall deliver to each party the names of five persons chosen at random from each of the categorical lists prepared by him pursuant to § 3-2A03(c), together with a brief biographical statement as to each of the 15 persons. If the claim or the response states that the matter falls within one or more recognized specialties, the Director, if practicable, shall include persons in the specialty on the list from the health care provider category. Before delivering the list, the Director shall inquire of the persons selected and assure himself that they do not have a personal or economic relationship with any of the parties that can form the basis of any partiality on their part. If, in the

judgment of the Director, a person selected has such a relationship with a party, his name shall be replaced by another chosen at random. The Director shall also deliver to each party within ten days after the time for filing a response, a copy of § 3-2A06 of this subtitle relating to judical review.

(c) *Objection to arbitrator on list; striking names.* — Within 30 days after delivery of the list, a party may object in writing stating the reasons therefor to the inclusion of any arbitrator on the list. If the Director finds a reasonable basis for the objection, he shall replace the name of the arbitrator with the name of another arbitrator. Within the same 30-day period, each party shall strike from the list in each category any name or names that are unacceptable and return a copy of the list with his strikes to the Director. A party may not strike more than two names in any category. If,

(1) The claim is against more than one health care provider, whether directly by a claimant or as a result of a third-party claim, the health care providers claimed against shall be treated as a single party and shall exercise their strikes jointly; .

(2) There is more than one claimant, the claimants shall be treated as a single party and shall exercise their strikes jointly;

(3) Within the 30-day period, multiple claimants or multiple health care providers fail to agree on their strikes in any category, they shall notify the Director of their disagreement, and he shall make the strikes on their behalf with respect to that category;

(4) Any party fails to return a copy of the list with his strikes within the 30-day period, the Director shall make the strikes for that party.

(d) *Selection of arbitrators.* — The Director shall compare the lists returned to him and the lists from which he has stricken names pursuant to subsection (c), and shall select the first mutually agreeable person in each category as the arbitrators.

(e) *Agreement for single arbitrator.* — The parties may, within the time for returning their lists to the Director, agree in writing upon a single arbitrator. In that event, they shall advise the Director in writing of their choice, and the one arbitrator shall constitute the arbitration panel. (1976, ch. 235, § 1.)

§ 3-2A05. Arbitration of claim.

(a) *Issues to be referred by Director to panel.* — All issues of fact and law raised by the claim and response shall be referred by the Director to the arbitration panel.

(b) *Application of other sections and Maryland Rules.* — The provisions of §§ 3-212 through 3-217 and 3-220 of this article and the provisions of Chapter 400 of the Maryland Rules (Depositions and Discovery) are applicable to proceedings under this subtitle.

(c) *Chairman of panel.* — The attorney member of the panel shall be chairman and he shall decide all prehearing procedures including issues relating to discovery.

(d) *Determinations.* — The arbitration panel shall first determine the issue of liability with respect to a claim referred to it. If the arbitration panel determines that the health care provider is not liable to the claimant or claimants the award shall be in favor of the health care provider. If the arbitration panel determines that a health care provider is liable to the claimant or claimants, it shall then consider, assess, and apportion appropriate damages against one or more of the health care providers that it has found to be liable.

(e) *Assessment of costs.* — The award shall include an assessment of costs, including the arbitrators' fees.

(f) *Delivery of award to Director; service of copies.* — The arbitration panel shall deliver its award to the Director in writing, who shall cause a copy of it to be served on each party.

(g) *Application for modification or correction.* — A party may apply to the arbitration panel to modify or correct an award as to liability, damages, or costs in accordance with § 3-222 of this article.

(h) *Confirmation of award.* — Subject to § 3-2A06, the award of the panel shall be final and binding on the parties. After the time for either rejecting or modifying the award has expired the Director shall file a copy of the award with the circuit court having proper venue, as provided in Title 6, Subtitle 2 of this article and the court shall confirm the award. Upon confirmation the award shall constitute a final judgment. (1976, ch. 235, § 1.)

§ 3-2A06. Judicial review.

(a) *Rejection of award.* — A party may reject an award for any reason. A notice of rejection must be filed with the arbitration panel and served on the other parties or their counsel within 90 days after the award is served upon the rejecting party, or, if a timely application for modification or correction has been filed within 30 days after a disposition of the application by the panel.

(b) *Action to nullify award.* — At or before the time specified in subsection (a) for filing and serving a notice of rejection, the party rejecting the award shall file an action in court to nullify the award. Failure to file this action timely shall constitute a withdrawal of the notice of rejection. Subject to the provisions of subsection (c), the procedures applicable to the action including the form and necessary allegations in the initial pleading shall be governed by the Maryland Rules. If any party to the proceeding elects to have the case tried by a jury in accordance with the Maryland Rules, it shall be tried by a jury. Otherwise, the case shall be tried by a judge.

(c) *Modification, correction or vacation of award by court.* — An allegation that an award is improper because of any ground stated in § 3-223 (b) or § 3-224 (b) (1), (2), (3), or (4) of this article shall be made by preliminary motion, and shall be determined by the court without a jury prior to trial. Failure to raise such a defense by pretrial preliminary motion shall constitute

a waiver of it. If the court finds that a condition stated in § 3-223 (b) exists, it shall modify or correct the award. If the rejecting party still desires to proceed with judicial review, the modified or corrected award shall be substituted for the original award. If the court finds that a condition stated in § 3-224 (b) (1), (2), (3), or (4) exists, it shall vacate the award, and trial of the case shall proceed as if there had been no award.

(d) *Admissibility of award; presumption of correctness.* — Unless vacated by the court pursuant to subsection (c), the arbitration award is admissible as evidence in the judicial proceeding. The award shall be presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct.

(e) *Assessment of costs.* — If the verdict of the trier of fact is not more favorable to the party that rejected the arbitration panel's award, than was the award, the costs of the judicial proceedings shall be assessed against the rejecting party. Otherwise, the court may determine the assessment of such costs.

(f) *Venue.* — Venue shall be determined in accordance with the provisions of § 6-201 of this article. (1976, ch. 235, § 1; 1977, ch. 265.)

§ 3-2A07. Counsel fees.

An attorney may not charge or collect compensation for legal services in connection with the arbitration of a claim under this subtitle unless it is approved by the arbitration panel. An attorney may not charge or collect compensation for legal services in connection with a judicial proceeding under this subtitle unless it is approved by the court. (1976, ch. 235, § 1.)

§ 3-2A08. Effect of advance payment.

(a) *Evidence of payments inadmissible; deduction from award.* — Evidence of advanced payments made pursuant to § 482A (c) of Article 48A of the Code is not admissible in any arbitration or judicial proceeding for damages due to medical injury until there is an award, in the case of arbitration proceedings, or a verdict, in

the case of judicial proceedings, in favor of the claimant and against the person who made the advanced payments. Upon the finding of such an award or verdict, the arbitration panel, or the trier of fact, shall make a finding of total damages, and shall then deduct whatever amounts it finds were paid by or on behalf of the defendants pursuant to § 482A (c) of Article 48A. The net amount, after this deduction, shall be entered as its award or verdict.

(b) *Award exceeding payments.* — If the award or verdict exceeds the amount of advanced payments and the arbitration panel or the court finds that the advanced payments were reasonable, the panel or the court may (1) order that the amount by which the award or verdict exceeds the amount of advanced payments be paid over a period of time consistent with the needs of the claimant, rather than in a lump sum, and (2) authorize, as part of its order, the creation of a trust or other mechanism to assure the periodic payments. The panel or court shall provide to the claimant the option to choose either a lump sum or payments paid over a period of time.

(c) *Advanced payment exceeding liability.* — If the advanced payment exceeds the liability of the person making it, the arbitration panel or the court on appeal may order such adjustments as justice may require under the award or verdict, including, where appropriate, contribution by other parties found to be liable. In no event shall an advance payment in excess of the liability of the person making it be repayable by the person receiving it. (1976, ch. 235, § 1; 1977, ch. 265.)

§ 3-2A09. Construction of subtitle.

The provisions of this subtitle shall be deemed procedural in nature and shall not be construed to create, enlarge, or diminish any cause of action not heretofore existing, except the defense of failure to comply with the procedures required under this subtitle. (1976, ch. 235, § 1.)

Title 01
EXECUTIVE DEPARTMENT
Subtitle 03 HEALTH CLAIMS ARBITRATION OFFICE

Chapter 01 General Regulations

Authority: Courts and Judicial Proceedings Article, §§ 3-2A01-3-2A09, 5-109; Article 48A, § 482A, Annotated Code of Maryland

.01 Definitions.

A. "Act" means Courts and Judicial Proceedings Article, §§ 3-2A01 — 3-2A09, as amended from time to time.

B. "Arbitration Panel" means the arbitrators selected in accordance with the Act and these regulations to determine a health care malpractice claim.

C. "Attorney" means a member of the Maryland Bar.

D. "County" includes Baltimore City.

E. "Court" means a court of the Supreme Bench of Baltimore City with jurisdiction over actions in law or a circuit court for any other county.

F. "Director" means the Director of the Health Claims Arbitration Office.

G. "Health Care Provider" has the meaning stated in Courts and Judicial Proceedings Article, § 3-2A01(e).

.02 Applicability of Maryland Rules.

Except as expressly provided otherwise in the Act and these regulations, the Maryland Rules of Procedure govern all proceedings under the Act.

.03 Filing of claims.

A. Each claim made under the Act shall be filed with the Director on the claim form that he provides.

B. All appropriate allegations and exhibits that indicate the basis of the claim shall be attached to the claim form.

C. A claim shall specify the counties in which a court would have venue under Title 6, Subtitle 2, of the Courts Article.

D. A claim may state that the controversy falls within one or more particular recognized specialties.

04. Docket of Claims.

A. The Director shall keep a docket of all claims, and, on initial filing of a claim, shall assign a docket number to the claim. The docket is a public record, open during business hours for inspection.

B. After a claim is referred to an arbitration panel, the Chairman of the panel promptly shall forward to the Director any information concerning the status of the claim that the Director requires to keep a current docket.

05. Service of Pleadings.

A. The Director shall cause service of a copy of the claim to be made on each health care provider named in the claim by the appropriate sheriff according to the Maryland Rules. This regulation also applies to third party claims.

B. The Sheriff shall file with the Director an affidavit of service by the return day specified by the Director.

C. All other pleadings and all papers concerning discovery matters shall be filed with the Director and served on the parties according to Rule 306 of the Maryland Rules.

06. Response.

A. Each health care provider served with a claim shall file with the Director a response to the claim and any third-party claim within the time specified in the Maryland Rules.

B. A response may state that the controversy falls within one or more particular recognized specialty.

07. Arbitration Panel Selection.

A. Register of Panel Candidates.

(1) The Director shall compile and keep a current register of arbitration panel candidates. The register shall include any individual on the American Arbitration Association list of arbitrators who is willing to serve on an arbitration panel.

(2) The register shall be divided into the following three categories:

(a) Members of the general public who are not attorneys, health care providers, or agents or employees of any insurance company or society;

(b) Attorneys;

(c) Health care providers, subdivided, if practicable, by recognized health care specialties.

(3) If feasible, each category of the register also shall be divided into geographic areas based on the county in which the candidates reside.

B. Preparation of Candidate Lists.

(1) After a response is filed, the Director shall prepare an initial list of panel candidates that includes the names of five individuals selected randomly from each of the three categories of the register. The Director may prepare the initial list of panel candidates from each category so that it consists only of individuals residing in counties in which a court would venue under Title 6, Subtitle 2, of the Courts Article, if there are a sufficient number of names from that county or counties to permit random selection.

(2) The Director shall contact each individual on the initial list to determine if the individual is available to serve on a panel and if the individual has any personal or economic relationship with any party to the claim for which this list is being prepared.

(3) The name of each individual who is unable to serve or has a relationship to a party shall be removed from the list and replaced with the name of another

individual randomly selected from the appropriate category and qualified according to § B(2), above.

(4) If a panel candidate knowingly fails to disclose a relationship with a party, the Director shall remove the name of the candidate from the register and, in the case of any attorney or health care provider, shall report the circumstances to the disciplinary unit of the appropriate licensing agency.

C. Delivery of List to Parties. Within 10 days after the response is filed, the Director shall deliver to each party identical lists of panel candidates, including a brief biographical statement on each panel candidate, and a copy of Courts and Judicial Proceedings Article, § 3-2A06.

D. Party Selection of Candidates.

(1) In this regulation, "party" means, with respect to multiple claimants or multiple health care providers, all claimants, acting jointly, or all health care providers, acting jointly, as the case may be.

(2) Within 30 days after delivery of the list of panel candidates to a party, the party may object in writing stating the reasons for objection to inclusion of a panel candidate. If the Director finds a reasonable basis for the objection, the name of the panel candidate shall be removed from the list and replaced with the name of another individual selected according to § B(3), above. Within the same 30 days, the parties shall return to the Director a copy of the list from which the names of not more than two panel candidates from each category have been stricken.

(3) The parties instead may submit to the Director a written agreement selecting a single arbitrator.

(4) The Director shall make the strikes for a party on failure of the party to return a list and for multiple claimants or health care providers on notice that they cannot agree on their strikes in a particular category.

E. Notice of appointment.

(1) Within 10 days after party selection of the panel candidates, the Director shall compare the lists, including those returned to him and those from which he has made strikes, and shall select the first mutually agreeable individual in each category.

(2) The Director shall notify each panel candidate selected. Within 5 days after the notice, the panel candidate shall return to the Director written acceptance to serve as an arbitrator.

(3) After a panel candidate files a written acceptance to serve, he may not refuse to serve without filing the Director an affidavit of good cause showing that serving as an arbitrator would constitute an unreasonable burden or undue hardship. The Director shall remove from the register the name of any individual who violates this section.

F. Vacancies.

(1) If a vacancy occurs on an arbitration panel that has not begun hearings on the claim, the vacancy shall be filled by a substitute panelist. If feasible, the Director shall select as the substitute the second mutually agreeable individual in the appropriate category of the list of panel candidates as provided in § E(1), above, above.

(2) If a vacancy occurs on an arbitration panel that has begun or completed hearings on the claim but has not made an award, the claim shall be heard by a new arbitration panel unless each party agrees in writing to the remaining panelists making the award or to a substitute panelist being selected and the Director concurs with the agreement.

G. Contact with Panel Candidates and Members.

(1) Except as provided in § G(2), below, a party or his counsel may not communicate directly with an arbitration panel candidate or member concerning the claim.

(2) A party or his counsel shall communicate with a member of the arbitration panel only by either of the following means:

(a) Written communication submitted to the Chairman of the panel and served on the other parties or their counsel;

(b) Oral communication with the panel member in the presence of the other parties or their counsel.

(3) Any person aware of any communication with a panel candidate or member in violation of § G(1), above, immediately shall notify the Director. If, after investigation, the Director determines that the communication has prejudiced a hearing, he shall require selection of a new arbitration panel.

H. Conflict of Interest. A panel member may not enter into any contract or other agreement that can form the basis of any partiality on his part with any claimant or health care provider named in the claim before the conclusion of all aspects of the controversy.

.08 General Authority of an Arbitration Panel.

A. Issues before Panel. The Director shall refer to an arbitration panel all issues of fact and law raised by the pleadings, and the panel shall confine its consideration to those issues.

B. Duties of Chairman. The chairman of a panel shall decide all prehearing procedures including issues relating to discovery.

C. Majority of Panel. An arbitration panel shall exercise its authority by a majority.

0.09 Discovery.

A. "Party" Defined. For purposes of discovery, "party" includes every affiliate of a party. Personnel of an affiliate shall be considered to have the same relationship with the party as the relationship to the affiliate. All records of an affiliate shall be considered to be in the possession and control of, and capable of production by, the party.

B. Maryland Rules Applicable. The provisions of Chapter 400 of the Maryland Rules govern all discovery in any proceeding under the Act, except that the chairman of the arbitration panel shall determine all disputes concerning discovery.

C. Time for Discovery. The arbitration panel may set a time for completion of all discovery and all procedural matters in the proceedings.

.10 Prehearing Conference.

A. "Party" Defined. In §§ B — D, "party" means the counsel of record for a party or, if a party is not represented by counsel, the party himself.

B. Time. At least 30 days before the hearings on a claim begin, all parties shall meet with the chairman of the arbitration panel in a prehearing conference.

C. Purpose.

(1) At the prehearing conference, the parties shall consider all of the following:

(a) Simplification and identification of the issues;

(b) Exchange of exhibits and other documentary evidence proposed to be offered in evidence;

(c) Obtaining of admissions to or stipulation of facts not remaining in dispute and the authenticity of documents that might properly shorten the hearing;

(d) Limitation of the number of expert witnesses to be called and scheduling of their appearances;

(e) Estimation of the length of hearing;

(f) The date for the first hearing and successive hearings;

(g) Any other matters that may aid in expeditious consideration and determination of the claim.

(2) Each party is expected to be fully prepared for a useful discussion of and fully authorized to make commitments with respect to all problems involved in the proceedings. Preparation should include advance study of all relevant material and advance informal

communication between participants, including requests for additional information, to the extent that it appears feasible and desirable.

D. Order. The chairman of the arbitration panel shall prepare an order that specifies the agreements made at the preharing conference. A copy of the order shall be filed with the Director and served on each party. The order shall control subsequent consideration of the controversy unless, within 7 days after service of the order, a party submits to the Director written objections to the order specifying an error or unless, at the hearing, all parties and the chairman agree on modification of the order.

.11 Hearings.

A. Time and Place.

(1) The arbitration panel shall set the time and place for all hearings. However, unless all parties agree otherwise, a hearing shall be held only in a county in which a court would have venue under Title 6, Subtitle 2 of the Courts Article, at a place that is as close as possible to the claimant's residence.

(2) The arbitration panel may postpone a hearing on request of a party for good cause shown or on the panel's own motion.

(3) The arbitration panel may continue or adjourn a hearing, from time to time as necessary.

B. Notice.

(1) The arbitration panel shall give each party at least 5 days notice of a hearing. However, this section does not apply to resumption of a hearing that has been continued according to § A(3) above, if reasonable notice of the resumption has been given. Appearance at the hearing waives the notice.

(2) The arbitration panel also shall give public notice of the hearing in accordance with Executive Order No. 01.01.1976.09, relating to notice of meetings of executive public bodies. This requirement shall be

complied with by posting a notice of the hearing at the office of the Director at least 2 days before the hearing.

C. Default. Notwithstanding the failure of a duly notified party to appear, the arbitration panel may hear, and on the evidence produced, determine the controversy.

D. Rules of Evidence.

(1) The arbitration panel is not bound by the technical rules of evidence.

(2) Evidence of any advance payment under Article 48A, § 482A(c), is not admissible until after the arbitration panel determines the issue of liability.

E. Rights of Parties.

(1) Each party has the right to be represented by counsel at any phase of the proceedings under the Act. If a party appears without counsel, the arbitration panel shall, on the record, advise the party of the complexity of health care claims and suggest consideration of retaining counsel. A party who prefers not to retain counsel may proceed on his own. An attorney appearing in a representative capacity shall file with the Director a notice of appearance.

(2) On written request of a party, the arbitration panel shall provide an interpreter, the cost of which shall be considered a cost of the proceeding.

(3) At the hearing, each party has the right to be heard, to present evidence material to the controversy, and to cross-examine witnesses.

F. Authority of Panel — Subpoenas.

(1) The arbitration panel may issue subpoenas for attendance of witnesses and for production of records and other evidence.

(2) The arbitration panel or any party may petition the court to enforce a subpoena. All provisions of law that compel a person under subpoena to testify apply to proceedings under the Act.

G. Authority of Panel — Witnesses.

(1) On request of a party or on the panel's own motion, the arbitration panel shall administer the oath to a witness.

(2) Any arbitrator may question a witness.

(3) Witness fees are as provided for a witness in circuit courts of this State.

H. Authority of Panel — Record.

(1) All proceedings before the arbitration panel shall be recorded. On written request of a party or on the panel's own motion, the proceedings, in whole or part, shall be transcribed. Any transcript shall be available to a party on his payment of the cost.

(2) Corrections and physical changes may not be made on the official transcript unless one of the following occurs:

(a) The arbitration panel determines the correction to be necessary to conform the transcript with the evidence as presented;

(b) All parties agree in writing to the correction and the Chairman of the panel concurs with the agreement.

I. Authority of Panel — Close of Hearing.

(1) After presentation of all evidence, an arbitration panel may order the parties to file briefs.

(2) The hearing shall close after presentation of all evidence or, if briefs are ordered, on the final date set for submission of briefs.

J. Authority of Panel — Reopening Hearing. An arbitration panel may reopen the hearing on written request of a party for good cause shown or on the panel's own motion at any time before the arbitration panel files its award.

.12 Award.

A. Determination of Liability. An arbitration panel shall first determine, with respect to each health care provider named in the claim, whether or not he is liable

to a claimant. This determination shall be considered an award, as to the issue of liability for purposes of § 3-2A08(a) of the Courts Article.

B. Award for Provider. If the arbitration panel determines that a health care provider is not liable, the panel shall make an award in favor of the provider.

C. Award for Claimant.

(1) If the arbitration panel determines that a health care provider is liable, the panel shall then consider and determine the amount of damages in accordance with this section. Evidence of advance payments pursuant to Article 48A, § 482A(c), Annotated Code of Maryland, is admissible at this stage of the proceeding.

(2) The panel shall determine:

(a) If one provider is determined liable to one claimant, the total amount of damages owed by the provider to the claimant;

(b) If more than one provider is determined liable to one claimant, the total amount of damages owed by each provider to the claimant;

(c) If one provider is determined liable to more than one claimant, the total amount of damages owed by the provider to each claimant;

(d) If more than one provider is determined liable to more than one claimant, the total amount of damages owed by each provider to each claimant.

(3) If any advance payment has been made under Article 48A, § 482A(c), Annotated Code of Maryland, the arbitration panel shall subtract the amount of advance payments made to a claimant on behalf of a provider from the total damages calculated to be owed by the provider to that claimant under § C(2), above.

(4) The award of damages shall be adjusted as follows:

(a) If the amount of total damages exceeds the amount of advance payments, the net amount constitutes the award of damages for purposes of § E(1)(b),

below, and at the option of the claimant, is payable in a lump sum or periodic payments;

(b) If the amount of advance payments exceeds the amount of total damages, the arbitration panel may not require any repayment by a claimant but may make any other equitable adjustment of the award of damages, including contribution from other parties determined liable.

D. Arbitration Costs.

(1) An arbitration panel shall determine the arbitration costs, including arbitrators' fees, and may apportion the costs among parties.

(2) The chairman of an arbitration panel is entitled to receive a $60 per diem. Each other member of an arbitration panel is entitled to receive a $40 per diem.

(3) A panel member shall receive the per diem for the following time spent in transaction of panel business:

(a) For 6 or more hours in a calendar day;

(b) For a total of 6 or more hours accumulated from calendar days in which less than 6 hours were worked.

(4) In addition to the per diem, each member of an arbitration panel is entitled to receive, according to the standard travel regulations adopted by the Board of Public Works, reimbursement for expenses incurred in transaction of the panel's business.

E. Form of Award.

(1) Within 5 days after the close of the hearing, the arbitration panel shall submit to the Director a written award that concisely states the following information:

(a) With respect to each health care provider, that he was liable or that he was not liable;

(b) If applicable, the amount of damages calculated under § C, above;

(c) The arbitration costs and any apportionment made under § D, above.

(2) The director shall cause a copy of the award to be served on each party.

(3) If, within 20 days after an arbitration panel submits its award, an attorney submits a written request for compensation for his legal services in connection with arbitration of the claim, the arbitration panel shall consider the request and shall approve any justifiable request as a supplement to an award.

F. Settlements.

(1) Before an award is filed with the Director, parties who agree on a settlement may submit to the arbitration panel a written settlement agreement.

(2) An arbitration panel may incorporate a settlement agreement in its award. However, a settlement agreement does not affect any party not participating in the agreement and does not prevent a determination of the issues involving those parties by the panel.

(3) An arbitration panel shall determine the amount of arbitration costs incurred before settlement and may apportion the cost among the parties unless the settlement provides for payment of the costs.

.13 Modification of Award.

A. Application for Modification.

(1) Within 20 days after an award is served on a party, the party may apply to the arbitration panel for modification of the award.

(2) Each other party shall be given notice of the application for modification stating that the party shall file any objection to the application within 10 days.

B. Basis for Modification.

(1) An arbitration panel may modify its award for any of the following purposes:

(a) To clarify the award;

(b) To correct the imperfect form of an award, not affecting the merits of the controversy;

(c) To correct an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

(d) Without affecting the merit of the determination on issues submitted to an arbitration panel, to correct an award made on a matter not submitted to the panel.

(2) An arbitration panel shall modify its award according to a court order made under § 3-222(d) of the Courts and Judicial Proceedings Article.

(3) A modified award may include, as a separate item, the amount of additional arbitration costs incurred in determination of the issue of modifying the award.

C. Filing of Modified Award.

(1) Within 20 days after an application for award modification is referred to the arbitration panel, the panel shall submit to the Director a written statement of the panel's determination on the application, the modification to the award, if any, and the additional arbitration costs incurred, and the allocation of those costs among the parties or any of them.

(2) The Director shall cause a copy of the arbitration panel's determination to be served on each party.

.14 Rejection of Award.

A. Time for Rejection. Within 90 days after an award is served on a party, or if application for modification was made, within 30 days after a determination on the application, a party may reject the award as provided in this regulation.

B. Notice of Rejection.

(1) Subject to § B(2), below, a party may reject an award by filing with the Director and serving on each other party a notice of rejection.

(2) A party rejecting an award shall file with the court an action to nullify the award. Failure to file this action constitutes a withdrawal of any notice of rejection.

C. Form of Action. The Maryland Rules govern the form of all actions to nullify awards.

.15 Confirmation of Award.

On expiration of the time for modification and rejection of an award, the Director shall file a copy of the award with the appropriate court, and the Court shall confirm the award.

Effective Date: December 22, 1976 (3:26 Md. R. 1536)

APPENDIX F

Maryland Courts & Judicial Proceedings

Subtitle 9. Wrongful Death.

§ 3-901. Definitions.

(a) In this subtitle, the following terms have the meanings indicated.

(b) *"Child"* means a person under 18 years of age and includes an illegitimate child of a deceased mother.

(c) *"Parent"* includes the mother of a deceased illegitimate child.

(d) *"Person"* includes a body politic and corporate if otherwise applicable.

(e) *"Wrongful act"* means an act, neglect, or default including a felonious act which would have entitled the party injured to maintain an action and recover damages if death had not ensued. (An. Code 1957, art. 67, §§ 1, 4, 6; 1973, 1st Sp. Sess., ch. 2, § 1.)

§ 3-902. Liability notwithstanding death.

(a) *Action against person causing death of another.* — An action may be maintained against a person whose wrongful act causes the death of another.

(b) *Liability of vessel.* — If the death of a person was caused by a wrongful act, neglect, or default of a vessel, an action in rem may be maintained against the vessel.

(c) *Action against personal representative of person who caused death.* — If a person whose wrongful act caused the death of another, dies before an action under this section is commenced, the action may be maintained against his personal representative. (An. Code 1957, art. 67, § 1; 1973, 1st Sp. Sess., ch. 2, § 1.)

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-104

JAMES JOHNSON, ET AL.,

Appellants,

v.

ATTORNEY GENERAL OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION OF APPELLEES TO DISMISS APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-104

JAMES JOHNSON, ET AL.,

Appellants,

v.

ATTORNEY GENERAL OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION OF APPELLEES TO DISMISS APPEAL

The Attorney General of Maryland, the Johns Hopkins Hospital, the Medical and Chirurgical Faculty of Maryland, and the Medical Mutual Liability Insurance Society of Maryland, Appellees in the above captioned case, sought to be appealed to this Court, move pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that most of the federal questions sought to be reviewed were not passed upon them by the Court of Appeals of Maryland, and on the further ground that no substantial federal question is presented by the appeal.

I.

APPELLANTS' CONTENTIONS THAT THE HEALTH CARE MALPRACTICE CLAIMS ACT, TITLE 3, SUBTITLE 2A, COURT AND JUDICIAL PROCEEDINGS ARTICLE, MARYLAND CODE, DENIES DUE PROCESS TO CLAIMAINTS UNDER THE ACT BECAUSE THE HEALTH CARE PROVIDER MEMBER OF EACH ARBITRATION PANEL HAS A PECUNIARY INTEREST IN THE OUTCOME OF THE ARBITRATION; AND THAT THE ACT FAILS TO DIRECT WHAT RULES AN ARBITRATION PANEL IS TO USE IN DETERMINING LIABILITY AND DAMAGES; AND THAT "A MAJORITY OF THE PANEL HAS NO LEGAL TRAINING OR EXPOSURE TO THE INTRICACIES OF TORT LAW" WERE NOT EXPRESSLY PASSED UPON BY THE MARYLAND CODE OF APPEALS.

Rule 16(1)(b) reads in pertinent part, as follows:

> The Court will receive a Motion to Dismiss an Appeal from a State Court on the ground . . . that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on. . . .

As pointed out in *Street v. New York,* 394 U.S. 576, 582 (1969):

> This Court has stated that when as here, a highest state court has failed to pass upon the federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

The specific issues described above were not expressly passed upon by the Court of Appeals in its opinion in this case, and Appellees believe that if these issues were addressed at all in the Appellants' Brief, they were addressed in the context of State Constitutional Issues rather than in the context of *Federal* Due Process.

II.

NO SUBSTANTIAL FEDERAL QUESTION EXISTS AS TO WHETHER THE HEALTH CARE MALPRACTICE CLAIMS ACT DENIES DUE PROCESS TO CLAIMANTS UNDER THE ACT.

Initially, Appellants direct this Court's attention to several general principles of constitutional law. First, it is a cardinal principle of law that legislation is presumed to be constitutional, and proof of unconstitutionality of the legislation must be clear and convincing. *See, e.g. Powell v. Pennsylvania,* 127 U.S. 678 (1888); *Cf. Carolene Products Company v. United States,* 323 U.S. 18 (1944), nor will the Courts question the wisdom or expediency of legislation, in determining whether or not it is constitutional. *See, e.g., Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955); *Nebbia v. New York,* 291 U.S. 502 (1934). Finally, and especially important, as pointed out by the Court of Appeals in the present case, *quoting from Munn v. Illinois,* 94 U.S. (4 Otto.) 113, 134 (1877):

> A person has no property, no vested interest, in any rule of the common law . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.

More recently, this Court has stated that:

> The Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative object.

Silver v. Silver, 280 U.S. 117, 122 (1929). Thus, appellants' contentions that the Health Care Malpractice Claims Act are in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution are faced at the outset with the heavy burden of showing that convincing evidence of unconstitutionality was established in the

trial court and presented to the Court of Appeals in this case.

Appellants assert that under the Act, a medical malpractice claimants is denied a meaningful opportunity to be heard at the panel because "his rights are adjudicated by a biased decision maker" — the health care provider member of each panel. This is so, claim the appellants, because "[e]very health care provider who serves on the panel will have a pecuniary interest in the outcome of the arbitration in that a large damage award will adversely affect the malpractice insurance premiums of that arbitrator." (Jurisdictional statement of Appellant at 7). These conclusions are purely speculative, inasmuch as the appellants failed altogether to establish either by testimony or by reference to any authoritative publication, that it would be of any significant pecuniary benefit to Maryland's medical community or to its malpractice insurers to unilaterally deny meritious malpractice claims at the panel level. To the contrary, appellees suggested, and will attempt to demonstrate, that it is in the better interest of both physicians and insurers that the panels' decisions be arrived at in a scrupulously fair manner.

Initially, appellees submit that in order to disqualify a decision maker on the ground of bias, one must show a direct and substantial pecuniary interest on the part of the decision maker in the outcome of the matter at issue before him. In *Gibson v. Berryhill,* 411 U.S. 564 (1973), the Court upheld a three-judge district court's finding that such pecuniary interests existed on the part of the Alabama Board of Optometry in a delicensing procedure before the Board in which the Board members stood to lose about one half of their competition if they chose to revoke the defendant optometrists' licenses. In that case it was unequivocally in the best pecuniary interest of the Board members to revoke, because the competitors' business would revert directly

to them. By contrast, in the recent case of *State, use of Strykowski v. Wilkie,* 261 N.W.2d 434 (Wis. 1978), involving a system for compulsory arbitration of malpractice claims essentially identical to that involved in the instant case, the Wisconsin Supreme Court rejected a contention that the panel members who were health care providers would be "financially interested" because they, along with all other health care providers in the State, pay annual assessments to maintain the patients' compensation fund. The Wisconsin Court noted that:

> [a]ny financial interest inherent in the structure of [the Wisconsin Act] is too remote and speculative to require disqualification. Absent evidence to the contrary, adjucators must be presumed to be persons of honesty and integrity. *See*: *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

261 N.W.2d at 445-46. The Court proceeded to point out, additionally that the purpose of having medically trained panel members was to provide special expertise for deciding highly technical medical issues, and hence, "[d]isqualification of medical members would emasculate the panel review process." *Id.*

Of course, as pointed out above, the appellants were able to develop no evidence that it would be in the pecuniary interests of physicians and malpractice insurers to deny meritious claims in the arbitration panel level. This proposition is not self-evident, and it is certainly not a matter for judicial notice. To the contrary, it can perhaps be more persuasively argued from the evidence produced at trial that the system embodied in the Act will successfully reduce the costs of medical malpractice insurance only if the arbitration panels decide cases fairly and even handedly so that neither claimants nor health care providers are consistently dissatisfied with the decisions at the arbitration level.

This analysis is supported by two considerations, both of which were before the trial court in the instant case, and both of which were presented to the Court of Appeals. First, it is an established fact that a major element of medical malpractice insurance expenses is the cost of defense. The Report of Maryland's Medical Malpractice Insurance Study Committee, presented to the Maryland General Assembly, entered into evidence at trial in this case, and referred to by the Court of Appeals in its Opinion (Appx. to Jurisdictional Statement at 6 a), indicates that approximately 50% of the reserves set aside for claims by the former leading medical malpractice insurer in Maryland was attributable to legal fees likely to be incurred in defending the claims. This estimate was not challenged at trial or on appeal. Second, the trial court found as fact:

> The arbitration procedure mandated by the Act will substantially increase the claimant's cost of arbitration if either party desires to have the case tried thereafter in Court. On the other hand, the arbitration procedure will reduce the claimant's cost of litigation if all parties accept the arbitration award."

(Appx. to Jurisdictional Statement at 49a). Patently, it would seem to be equally true that the cost of defending an arbitration procedure will be less if the procedure is not subsequently taken to judicial trial.

Logically, then, the cost of malpractice insurance will be lower in the long run if both claimants and health care providers are maximally satisfied with the decisions of the arbitrators. Otherwise, the dissatisfied parties will be inclined to seek judicial review, especially in cases where substantial damages are involved. If, as appellants suggest, the panel members who are health care providers are truly motivated by a desire to keep insurance costs down, this goal can likely be achieved best by deciding the cases as fairly as possible.

Of course, the purpose of the foregoing analysis is not to reargue the comparative merits of arbitration and traditional common law judicial procedure. The system embodied in the Act is as yet essentially untried, and speculation about its future effectiveness is not germane to its constitutionality in any event. Rather, this analysis demonstrates that members of the panel who are health care providers do not inevitably have a direct and substantial pecuniary interest in denying meritious malpractice claims, and thus, there is no apparent factual basis to appellants' assertions that the Act violates due process by providing for a bias decision maker.

Appellants also argue that the Act:

> Furthers the opportunity for arbitrariness by failing to provide any affect *voir dire*. The act only provides in Section 3-2A04(c) that each party may strike any two names from the list of possible panel members provided by the Director. The parties have no opportunity to examine the panel candidates as to their interests in the determination of liability and damage.

(Jurisdictional Statement at 7).

The Appellants misread the Act when they state that each party may strike only two panel members. Section 3-2A04(c) allows the parties 30 days in which to object for cause to the inclusion of any arbitrator on the list. *In addition,* each party may then strike two names from the list, regardless of cause. The parties are provided with biographical statements as to each prospective panel member along with the list of prospective panel members (Section 3-2A04(b)). The Act does not prevent a party or his counsel from further investigating the background or *curriculum vitae* of a prospective panelist during the 30 day period set forth in Section 3-2A04(c). Indeed, the appellants cite no authority to support the proposition that due process requires any *voir dire* of prospective panelists.

Finally, in this regard, as pointed out by the Court of Appeals (Appx. to Jurisdictional Statement at 24a), Section 3-2A06(c) of the Act provides that "a party may have the award vacated by a trial court on the ground, among others, of evident partiality by an arbitrator," in which event, the matter is taken to trial as if there had been no award. Taken as a whole the procedural safeguards in the Act against bias on the part of panel members are substantial, and more than adequate to satisfy due process.

Appellants next suggest that the Act violates due process because it purportedly sets no standards for determination of liability and assessment of damages, and it purportedly contains no rules of evidence. Appellees do not believe that this issue is properly before this Court at the present time, but assuming for the sake of argument, that it is, no substantial federal question exists in this respect because a careful reading of the Act discloses that it contains or incorporates by reference reasonably precise standards to guide the arbitrators in the resolution of malpractice claims.

(a) *Rules of Evidence*

Section 3-2A05(b) of the Act incorporates by reference into the Act *inter alia* Section 3-214(b), Courts and Judicial Proceedings Article, Maryland Code which states that: "[a]rbitrators are not bound by the technical rules of evidence". The Revisors' note to Section 3-214 indicates that the evidentiary provisions of Maryland's Administrative Procedure Act, Article 41, Section 252, Maryland Code "having been equated" with this phrase. Section 252 of Maryland APA contains detailed guidelines for resolution of evidentiary issues by administrative tribunals, and appellants submit that this Section of the APA aply satisfies the requirement of due process in this respect.

(b) *Rules of Substantive Law*

Section 3-2A09 of the Act reads:

> The provisions of this Subtitle shall be deemed procedural in nature and shall not be construed to create, enlarge, or diminish any cause of action not heretofore existing, except the defense of failure to comply with the procedures required under this Subtitle.

The clear implication of this Section is that the rules of substantive law traditionally applicable to common law medical malpractice cases must be applied without change by the arbitration panels under the Act. The panel should experience little difficulty in determining and interpreting the applicable rules of substantive law because each panel will contain one attorney member who, pursuant to Section 3-2A05(c), shall be designated as chairman with the responsibility of deciding all prehearing procedures and discovery issues. There is absolutely no basis for assuming that different panels will not consistently apply the same rules of procedural and substantive law as suggested by the appellants.

Appellants argue further that "the procedure provided by the Act is arbitrary in a third way: it is unreasonable to presume at the trial level that the panel's finding is correct," referring to Section 3-2A06(d) of the Act, which provides that if a party rejects the award of the panel and demands a trial *de novo,* the award of the panel will be admissible into evidence at trial and presumed to be correct.

Appellants attacked this provision of the Act both at trial and in the Court of Appeals solely on the theory that it effectuated an infringement upon the right of trial by jury in violation of Article XV, Section 6 of the *Maryland* Constitution. Having failed in this contention in the Court of Appeals, they now assert for the first time that this provision denies Fourteenth Amendment Due Process. Insofar as this contention is raised

for the first time on this appeal, it is not properly before this Court, but even if it were, the contention itself is without merit.

Contrary to appellants' attempt to distinguish the "presumptions of correctness" in the Act and in Maryland's Workman's Compensation Law, the respective provisions are essentially identical. Section 3-2A06(d) of the Act reads in pertinent part as follows:

> Unless vacated by the Court pursuant to Subsection (c), the arbitration award is admissible as evidence in the judicial proceeding. The award shall be presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct.

By comparison, Maryland's Workman Compensation Law, Article 101, Section 56(c) provides, in pertinent part:

> In all court proceedings under or pursuant to this Article, the decision of the Commission shall be prima facie correct and the burden of proof shall be on the party attacking the same.

Long ago, the Maryland Court of Appeals interpreted this portion of the Workman's Compensation Law in the following manner:

> [The rule] simply puts the burden of proof upon the party taking the appeal, whether he be plaintiff or defendant. In other words, it establishes no new rule when the plaintiff happens to be the party appealing, as the burden was always upon the plaintiff to prove his case. But it shifts the burden from the plaintiff to the defendant, where the defendant losses before the Commission and desires to appeal from its decision, requiring the defendant in such a case to satisfy the jury by a preponderance of testimony that the plaintiff is not entitled to the award made by the Commission.

Stewart & Company v. Howell, 136 Md. 423, 434, 110 A. 899, 902 (1920). For essentially the same reasons, this

Court upheld a similar clause contained in the Act to Regulate Commerce of February 4, 1887, which provided that the findings and order of the Interstate Commerce Commission should be "Prima Facie evidence of the facts stated therein" in a subsequent civil suit before a jury to enforce payment of a Commission order, in *Meeker v. Lehigh Valley Railroad Company,* 236 U.S. 412 (1915), against a claim that this provision infringed upon the Seventh Amendment right to trial by jury and operated as a denial of due process. In *Meeker,* it was explained that:

> The provision only establishes a rebuttable presumption. It cuts off no defense, and interposes no obstacle to a full contestation of all issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away of its incidents. Nor does it in any wise work a denial of due process law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all of the proceedings upon which their validity depends. Such statutes have been generally sustained . . . as have many other state and federal enactments establishing other rebuttable presumptions. . . .

230 U.S. at 430. And in *Hawkins v. Bleakly,* 243 U.S. 210 (1917), a similar provision in Iowa's Workmen's Compensation Law was sustained against a contention that it was contrary to the provisions of the Fourteenth Amendment, this Court holding that:

> A provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law.

243 U.S. at 214. Seizing upon this statement in *Hawkins,* appellants charge that the presumption contained in the Act is "unreasonable," yet they produce no persuasive argument as to why this is so. It

is claimed that there is no standards to guide the panels' decision, yet it is clear from the statute that such standards are present, as explained above. It is further argued that the presumption is unreasonable because two of the panel members are not trained in the law, yet it is the blending of legal and medical expertise in the panels' compensation which is the central feature of the Act, and which, it is hoped, will make the panels eminently suitable to decide medical malpractice controversies. It is precisely this blending of expertise, in fact, which renders the "presumption of correctness" reasonable. Parenthetically, appellees point out that few, if any, jurors possess "legal training or exposure to the intricacies of tort law."

Finally, appellants claim that "prohibitive cost of trying a malpractice claim twice" works a "denial of any meaningful opportunity to be heard in violation of the Due Process Clause." The short answer to this argument is that claimants are not forced to "try their claims twice" under the Act, and no evidence adduced at trial establishes that the panel hearings would be inadequate or unfair. As noted by the Court of Appeals:

> When we recall that there is no vested interest in any rule of the common law, *Munn v. Illinois,* 94 U.S. (4 Otto.) 113, 134, 24 L. Ed. 77 (1887), so that the common law "may be abrogated or changed as the General Assembly may think most inducive to the general welfare" The *State v. Buchanan et al,* 5 H.&J. 317, 366 ([MD] 1821) (concurring opinion), it becomes apparent that there is here no denial of the due process right of access to the Courts by the addition of a mode of procedure which merely causes some delay and increases the expense for a litigant who takes his claim to Court, since there is no deprivation of any vested property right.

(Appx. to Jurisdictional Statement at 26a, 27a). As recently pointed out in *State, use of Strykowski v. Wilkie, supra.,* at 444:

> It has been held, however, that a party is not deprived of due process merely because it must seek administrative resolution of its claims before it has access to the courts. *West Penn Power Company v. Train,* (3d Cir. 1975), 522 F.2d 302, 313. This conclusion is equally applicable to the panel review process.

Accord, e.g., Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976) *cert. denied,* ___ U.S. ___, 97 S. Ct. 740 (1977); *Application of Smith,* 381 Pa. 223, 112 A.2d 625 (1955), *App. dism. sub nom. Smith v. Wissler,* 350 U.S. 858 (1955).

In fact, the substance of appellants' contention seems to be that any restriction upon or preconditioned to the right to trial by jury is also a denial of due process. This argument was emphatically rejected recently in *Melancon v. McKeithen,* 345 F. Supp. 1025, (E. D. La. 1972) (three judge court), *aff'd* 409 U.S. 943 (1973). In *Melancon,* the Court upheld a Louisiana statute allowing state appellate courts to reexamine jury findings of fact in civil cases, on the broad ground that the Seventh Amendment right to trial by jury in civil cases was not so fundamental to the American system of justice as to be required by Fourteenth Amendment due process. The Court concluded:

> Principles of a viable American Federalism would seem to allow the states to work out their own civil procedures when those procedures do not conflict with the preservation of ordered liberty. In addition to substantive rights, procedural rights for which no substitute is available are within the due process concept. "But trial by jury (particularly in its rigid common law sense) and grand jury indictment, for which the 'information' has proven a desirable substitute, should be classified as what they are — technical procedures in a state of arrested development, whose evolution must be allowed to continue if it is ever to catch up with the needs of modern society and aspire to serve the needs of modern man."

Id. at 1048. *Cf. Capital Traction Co. v. Hof,* 174 U.S. 1, 18-30 (1898).

Appellants totally ignore the point that the Act is designed to provide claimants and health care providers alike with a full and comprehensive hearing procedure, at less expense and accompanied by less delay than the parties would normally experience in a jury trial. As explained by the trial court (Appx. to Jurisdictional Statement at 49a), the present high cost of litigating medical malpractice claims "virtually precludes" the institution of claims in which the potential recovery is less than $15,000. Indeed, for litigants with small claims of this type, the Act provides for the first time an effective forum for resolution of their claims.

As recognized by both the trial court and the Court of Appeals there simply exists no substantial federal question respecting the constitutionality of the Act under the due process clause of the Fourteenth Amendment. The procedures embodied in the Act were created to provide the claimants and health care providers with a fair, inexpensive, and expert tribunal for the resolution of these particularly complicated and difficult claims, preserving the free right of judicial review to any party who might be aggrieved by a panel's award. Appellants have failed altogether to point out a single aspect of the procedure that is inconsistent with the demands of due process.

III.

NO SUBSTANTIAL FEDERAL QUESTION EXISTS AS TO WHETHER THE PROVISIONS OF MARYLAND'S HEALTH CARE MALPRACTICE CLAIMS ACT DENY MEDICAL MALPRACTICE CLAIMANTS THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants contend that the provisions of the Act deny equal protection to medical malpractice claimants

as a class because those provisions have "no fair and substantial relation to any legitimate legislative objective" (Jurisdictional Statement at 13). To reach this conclusion they speculate that arbitration will not be less expensive or less time consuming than traditional judicial procedure. They next speculate that the arbitration system will "deter[] malpractice and limit awards" (Jurisdictional Statement at 14), and they ask rhetorically whether this is an effective way to improve health care in Maryland.

As to whether or not arbitration by itself will be less expensive than judicial procedure, the trial court found as fact that arbitration alone would be both less expensive (Appx. to Jurisdictional Statement at 49a) and less time consuming (Appx. to Jurisdictional Statement at 50a) then traditional procedure in the Courts. This issue is no longer open to appeal.

As to whether the procedure embodied in the Act has "a fair and substantial relation to any legitimate legislative objective," one need only articulate the legislative objective to see that the Act is rationally designed to bring it about. The trial court found as fact that Maryland's predominent malpractice insurer, the St. Paul & Fire Marine Insurance Company, announced in May 1974 its intention to cease writing medical malpractice insurance in the State, and efforts to induce another carrier to enter the market in St. Paul's place proved futile (Appx. to Jurisdictional Statement at 51a). In 1975, the Maryland General Assembly created the Medical Mutual Liability Insurance Society of Maryland to fill this void, and some medical malpractice coverage has been provided since St. Paul's departure by "surplus line" carriers, the Mutual Fire Marine & Inland Insurance Company and the Glacier Generai Insurance Company (Appx. to Jurisdictional Statement 51a-52a). However, the trial court found as fact that:

> The medical malpractice insurance market, prior to the creation of Med Mutual, was very "tight"; and . . . even though Med Mutual has made liability insurance available to Maryland physicians, the absence of any other "admitted" carrier in the State signifies the continued precariousness of this particular type of insurance market.

(Appx. to Jurisdictional Statement at 52a). In short, the trial court found, and the Court of Appeals agreed, that a severe medical malpractice insurance crisis existed in Maryland after the departure of St. Paul and this crisis continued to exist up to the time that the Act was enacted. The Court of Appeals explained (Appx. to Jurisdictional Statement at 37a) the substantial relationship between the provisions of the Act and its purpose "—to reduce the cost of medical malpractice claims, thus reducing the cost of liability insurance and stabilizing the market" — as follows:

> [The trial] judge explained since the evidence established that an arbitration procedure could reasonably be expected to result in the resolution of such claims more rapidly and less expensively than by the usual mode of litigation — the statute being designed to encourage arbitration as the final resolution of the claim — the Act bears a fair and substantial relation to its purpose and is thus not in contravention of the Fourteenth Amendment or [the Maryland] Declaration of Rights.

Appellees see nothing in Appellants' Jurisdictional Statement that seriously challenges the reasoning of either the trial court or the Court of Appeals in this respect. Bearing in mind that the Act represents an attempt by the Maryland General Assembly to resolve a problem of recent origin in a relatively new and untested manner, and, at least in Maryland, "Courts are under a special duty to respect the legislative judgment where the legislature is attempting to solve a serious problem in a manner which has not had an opportunity to prove its worth," *Attorney General v. Johnson,* (Appx. to Jurisdictional Statement at 43a); *Bowie Inn v. City of Bowie,* 274 Md. 230, 237, 335 A.2d 679, 684 (1975). This Court should be loath to pay heed to the speculative assertions of the appellants to the effect that the Act will diminish the quality of health care in Maryland. Neither the trial court or the Court of Appeals found these assertions to be of any substance, constitutionally.

Insofar as the provisions of the Act bear a fair and substantial relation to the proper legislative purpose of stabilizing the medical malpractice insurance market in Maryland, there is no substantial federal question as to whether the Act denies the appellants or members of their class the equal protection of the laws.

Respectfully submitted,

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I HEREBY CERTIFY that on this 18th day of August, 1978 copies of the foregoing Motion of Appellees to Dismiss Appeal were mailed to Marvin Ellin, Esquire, Suite 201, 1101 St. Paul Street, Baltimore, Maryland 21201, attorney for Appellants, James and Sheila Johnson.